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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 498

THE FEDERAL LAND BANK OF BERKELEY,
PETITIONER,

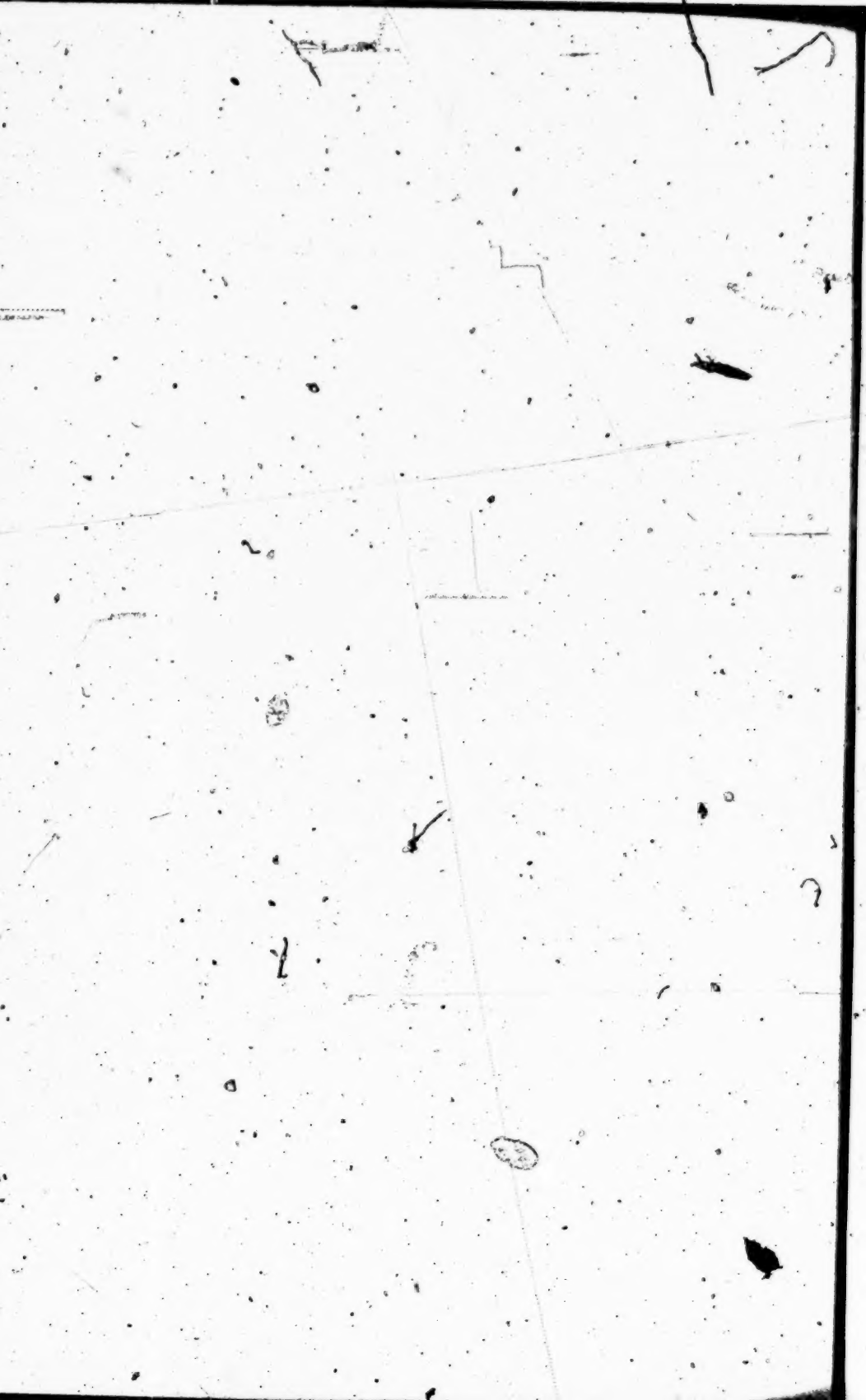
vs.

SAMUEL S. WARNER ET UX. ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1933

CERTIORARI GRANTED NOVEMBER 20 1933



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[fol. 1] In Superior Court of Maricopa County in and for the State of Arizona

#35727

The Federal Land Bank of Berkeley, a Corporation, Plaintiff,

vs.

Samuel S. Warner, also known as S. S. Warner, also known as Sam S. Warner, and Lydia S. Warner, his wife; The Salt River Valley National Farm Loan Association, a corporation; John D. Calhoun, County Treasurer and Ex-Officio Tax Collector of Maricopa County, State of Arizona; First Doe, Second Doe and Third Doe, Defendants

Amended Complaint to Foreclose Mortgage

Plaintiff complains and alleges:

I

The plaintiff is now and at all times alleged has been a corporation organized and existing under the laws of the United States of America, with its principal place of [fol. 2] business in the City of Berkeley, State of California; that defendant The Salt River Valley National Farm Loan Association is a corporation organized and existing under the Federal Farm Loan Act; that said defendants Samuel S. Warner and Lydia S. Warner are husband and wife; that said defendant John D. Calhoun is the duly elected, qualified and acting County Treasurer and Ex-Officio Tax Collector of the County of Maricopa, State of Arizona; that plaintiff does not know the true names of the defendants sued herein as First Doe, Second Doe and Third Doe, and prays that it may insert the true names of said defendants as soon as ascertained.

II

That Samuel S. Warner and Lydia S. Warner, on or about November 1, 1922, executed and delivered to said

plaintiff a certain promissory note in writing, in words [fol. 3] and figures as follows, to-wit:

(Here insert original note which is marked Plaintiff's Exhibit "A").

That said Samuel S. Warner and Lydia S. Warner, to secure payment of said promissory note, did execute and deliver to plaintiff a real estate mortgage, which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and that said mortgage was thereafter, on the 4th day of December, 1922, duly recorded in Book 153 of Mortgages, at pages 258-261 thereof, in the office of the County Recorder of Maricopa County, State of Arizona; that a copy of the said mortgage, with the endorsement and guarantee thereof is hereunto annexed and is in words and figures as follows, to-wit:

(Here insert original mortgage which is marked Plaintiff's Exhibit "B").

III

[fol. 4] That the installments of $234.00 each that became due and owing on said note on November 1, 1930, and May 1, 1931, respectively, have not been paid. That the Executive Committee of the plaintiff herein, being duly authorized by its Board of Directors, and acting under and by virtue of the provisions contained in said mortgage that in case of default of any of the obligations thereof the whole of the indebtedness secured by said mortgage might be declared payable, duly declared the whole of said mortgage indebtedness due and payable on the third day of June, 1931, and duly notified the mortgagors herein and The Salt River Valley National Farm Loan Association of such action. That more than thirty days have elapsed since such notification and The Salt River Valley National Farm Loan Association has not made good such defaults, either by payment thereof, or by the substitution of an equal amount of additional farm loan bonds.

IV.

[fol. 5] That no part of said note has been paid except $657.43 has been paid on principal and $2,852.57 has been paid as interest; that there is now unpaid from the makers

and guarantor of said note and mortgage, as named in Paragraph II, the following sums:

Unpaid principal, less delinquent installments . . . $6,074.57

Interest thereon at 5½% per annum from May 1, 1930, the date on which the last installment paid was due.

Delinquent installment due November 1, 1930 . . . . 234.00

Interest on said installment at 8% per annum from said date.

Delinquent installment due May 1, 1931 . . . . . 234.00

Interest on said installment at 8% per annum from said date.

That said mortgage provides that the mortgagor shall [fol. 6] pay all taxes and assessments before the same become delinquent and shall keep said property insured in the sum of $700.00, and that in default thereof the mortgagee may do so, and that any sum so paid out shall be repayable at once without demand and shall be secured by said mortgage.

That the said defendants failed to pay the State and County taxes on said property for the year 1930, and that in order to protect said property from said delinquent tax liens the plaintiff paid said taxes to the above-named County Treasurer and Ex-Officio Tax Collector of Maricopa County, said payment being in the sum of $185.86, which was the amount of the first installment of said tax, said payment being made on the 15th day of December, 1930, and upon which amount the plaintiff is entitled, under the terms of said mortgage, to interest at the rate of 7% per annum from the date of payment thereof, and in the sum of $185.86, which was the amount of the second installment [fol. 7] of said taxes, said payment being made on the 2nd day of June, 1931, and upon which amount the plaintiff is entitled, under the terms of said mortgage, to interest at the rate of 8% per annum from the date of payment thereof.

That the insurance on said property expired, or was about to expire, and that the defendants failed and neglected to renew the same as required by said mortgage, and that plaintiff, in order to protect said property from

fire hazard, was compelled to renew said insurance and to pay the premium therefor in the sum of $32.16. That said payment was made on the 2nd day of October, 1931, to Joyce & Company, Agents for the Fidelity-Phenix Fire Insurance Company, at Tempe, Arizona; that the plaintiff is entitled, under the terms of said mortgage, to interest on said amount at the rate of 8% per annum from the date of payment thereof.

[fol. 8] That plaintiff failed and neglected to pay the water charges levied by the Salt River Valley Water Users' Association against said property for water used thereon, and in order to protect the said property from the lien of said water charges plaintiff was compelled to pay, and did pay the same, to the Salt River Valley Water Users' Association in the sum of $356.77. That such payment was made on the 18th day of September, 1931, upon which amount the plaintiff is entitled, under the terms of said mortgage, to interest at the rate of 8% per annum from the date of payment thereof.

That said mortgage provides for a reasonable attorney's fee in this action and plaintiff alleges that a reasonable attorney's fee is the sum of $125.00. That the whole of said fee, if allowed by the Court, is to be paid to and be retained by the attorneys of record in this case.

[fol. 9] That no part of any of said sums has been paid.

V

That each and all of the defendants named herein, excepting the mortgagors and National Farm Loan Association above named claim to have a lien against, or interest, as trustees or otherwise, in the property described in said mortgage, or some part thereof, the nature or character whereof is unknown to this plaintiff; that such claim or interest is subsequent to and in all respects subject to the lien of the plaintiff under its mortgage as aforesaid.

Wherefore, plaintiff prays judgment: That each and all of the defendants and all persons claiming under them, or any of them, subsequent to the commencement of this action be foreclosed of all equity of redemption or other interest in the said mortgaged property and water stock; and for judgment against the makers and guarantor of said note [fol. 10] for the sums alleged in Paragraph IV hereof; that

the usual decree may be had for the sale of said mortgaged premises according to law and the practice of this court; that the premises may be sold as a whole; that the plaintiff, or any other party to this suit, may become the purchaser at said sale, and that the proceeds be applied in payment of the amount due the plaintiff, including attorney's fee and advances, costs and expenses of the sale, and costs of this suit; and that if there be any deficiency, that judgment therefor be entered against the defendants who made said mortgage and those who assumed and agreed to pay said mortgage and those who guaranteed said mortgage, all as alleged in Paragraph II hereof; and that the plaintiff have such further relief in the premises as this Court may deem meet and equitable.

Phillips, Holzworth & Phillips, Attorneys for Plaintiff.

[fol. 11] *Duly sworn to by Milton Rygh. Jurat omitted in printing.*

[fol. 12] IN SUPERIOR COURT OF MARICOPA COUNTY

ANSWER OF DEFENDANTS SAMUEL S. WARNER AND LYDIA S. WARNER TO AMENDED COMPLAINT

Come now Samuel S. Warner and Lydia S. Warner, two of the defendants named in the above-entitled action, and for answer to plaintiff's amended complaint in said action:

I

First. Admit the allegation in paragraph I of said complaint to the effect that these defendants are husband and wife. As to each of the other allegations in said paragraph I these defendants have not sufficient knowledge to enable them to either admit or deny said allegations, and they, therefore, demand that plaintiff be required to make strict proof thereof.

Second. Admit that they executed the note and the mortgage set out in paragraph II of said complaint; but deny [fol. 13] that they either signed or delivered said instruments, or either of the same, on or about the 1st day of November, 1922, and in this connection allege that said in-

struments were not signed, and said mortgage was not acknowledged, by them until the 28th day of November, 1922, and that said instruments were not finally executed by delivery thereof to or for the account of the plaintiff until on or about the 4th day of December, 1922.

Third. Deny each and every allegation contained in paragraphs III and IV of said complaint.

Fourth. Allege that they have no knowledge or information concerning any claim of lien or interest mentioned in paragraph V of said complaint and therein alleged to be claimed by each and all of the defendants named in said action, except these defendants and the defendant The Salt River Valley National Farm Loan Association; and for [fol. 14] such lack of information they neither admit nor deny said allegations and demand that plaintiff be required to make strict proof thereof.

Wherefore these defendants having fully answered plaintiff's amended complaint pray judgment of the court that plaintiff take nothing by its amended complaint and that these defendants go hence with their costs.

Chas. Woolf, Attorney for Defendants Samuel S. Warner and Lydia S. Warner.

II

Further answering said amended complaint, by way of set-off against the plaintiff, these defendants allege:

First. That the note and mortgage set out in said amended complaint, while dated November 1, 1922, were not finally executed by delivery thereof, to or for the account of plaintiff until on or about the 4th day of December, 1922.

[fol. 15] Second. That the principal mentioned in said note and mortgage, to-wit, Seven Thousand Two Hundred Dollars ($7,200.00) being the amount of said loan, was not paid in whole or in part by plaintiff to these defendants or for their account until on or about the 4th day of December, 1922.

Third. That while, as appears by the face of said note, the same draws interest at the rate of five and one-half (5½) per cent per annum, payable semi-annually, from the

date theerof, to-wit, November 1, 1922, these defendants are in justice and equity entitled to, and should be credited with interest on the amount of said loan, to-wit, $7,200.00 at the rate of 5½ per cent per annum for thirty-three (33) days, to-wit, for Thirty-six and 31/100 Dollars ($36.31).

Wherefore these defendants pray that Thirty-six and 31/100 Dollars ($36.31) be set off and credited against the [fol. 16] amount, if any, which the court may otherwise find to be due and owing from these defendants to plaintiff.

Chas. Woolf, Attorney for Defendants Samuel S. Warner and Lydia S. Warner.

III

Further answering said amended complaint, by way of set-off against the plaintiff, these defendants allege that as a condition precedent to the making of the loan evidenced by the note and mortgage set out in plaintiff's amended complaint the plaintiff required these defendants to pay to the defendant The Salt River Valley National Farm Loan Association from the proceeds of said loan Three Hundred Sixty Dollars ($360.00), that said association pay said $360.00 to plaintiff in payment for shares of plaintiff's capital stock, and that said stock be held by plaintiff as a part of the security for said loan. In this connection these de- [fol. 17] fendants allege that they complied with said condition and that said $360.00 was paid from the proceeds of said loan, as required by said condition, to plaintiff and applied in full payment for seventy-two (72) shares of plaintiff's said capital stock, and that said shares have at all times since said payment been, and now are, held by plaintiff as a part of the security for said loan; that these defendants have no knowledge or information as to the present value of said shares or as to the amount, if any, of any unpaid dividends or undistributed earnings thereon, but that plaintiff is in the full possession and control of all of the records and information from which the present value of said shares, including unpaid dividends and undistributed earnings thereon can be determined; and that in justice and equity plaintiff should disclose to these defendants and to the court all such information as may be neces- [fol. 18] sary to determine the present value of said shares, and that the amount of the value so determined should be

applied as a credit on the amount, if any, which the court may find due to plaintiff in this action.

Wherefore these defendants pray:

First. That plaintiff be required to disclose to the court and to these defendants any and all such records and information as may be necessary to determine the present value of said seventy-two shares of plaintiff's capital stock; and

Second. That the amount of the present value of said shares be determined by the court and set-off and credited against the amount, if any, which the court may otherwise find to be due and owing from these defendants to plaintiff.

Chas. Woolf, Attorney for Defendants Samuel S. Warner and Lydia S. Warner.

[fol. 19] IV

Further answering said amended complaint, by way of set-off against the plaintiff, these defendants allege that prior to the filing of said amended complaint these defendants paid to plaintiff Two Hundred Forty-four and 35/100 Dollars ($244.35) to apply on the water charges mentioned in paragraph IV of said amended complaint and therein alleged to have been made by the Salt River Valley Water Users' Association against the land described in the mortgage set out in said complaint for the use of water on said land and which plaintiff therein claims to have paid on the 18th of September, 1931.

Wherefore these defendants pray that Two Hundred Forty-four and 35/100 Dollars ($244.35) be set-off and credited against the amount, if any, which the court may otherwise find to be due and owing from these defendants to plaintiff.

Chas. Woolf, Attorney for Defendants Samuel S. Warner and Lydia S. Warner.

[fol. 20] In Superior Court of Maricopa County

Reply of Plaintiff

Comes now The Federal Land Bank of Berkeley, a corporation, the plaintiff in the above enfitled action, and for

reply to the further answer and set-off of the defendants Samuel S. Warner and Lydia S. Warner, to the plaintiff's amended complaint in said action:

I

This plaintiff, replying to the second answer of the defendants, Samuel S. Warner and Lydia S. Warner, admits that said note and mortgage are dated November 1, 1922, and alleges that on November 17, 1922, plaintiff remitted the net amount available under said loan, to-wit, the sum of $6,919.50 to Arizona Title Guarantee and Trust Company, at Phoenix, to be paid out by it for the said defendants [fol. 21] and for their use; that plaintiff was duly authorized in writing by said defendants to so remit said funds and to have them so paid out, and that Samuel S. Warner, one of said defendants, subsequently, to-wit on the 5th day of December, 1922, duly ratified the disposition of said funds and received the balance thereof from said Arizona Title Guarantee and Trust Company on behalf of said defendants.

Plaintiff denies that defendants were entitled to be credited with the sum of $36.31 interest for the period of 33 days, and alleges that said defendants were entitled to a rebate of interest for the period from November 1st, 1922 to November 17, 1922, the date of said remittance, and that such rebate was fully made and allowed at the date of the first installment called for by said note and mortgage, to-wit, on May 1st, 1923, in the sum of $18.70, said defendants paying as such first installment the sum of [fol. 22] $215.30 instead of $234.00.

II

Replying to said defendant's third answer this plaintiff alleges that under the provisions of the Act of Congress approved July 17, 1916, known and cited as the Federal Farm Loan Act, it is required that any person desiring to borrow on farm land mortgage with a Federal land bank shall make application to the local national farm loan association for membership therein and shall subscribe for shares of stock in such farm loan association to an amount equal to five per centum of the face of the

desired loan, said subscription to be paid in cash upon the granting of the loan. If the application for membership in said farm loan association is accepted and the loan is granted, said applicant shall, upon full payment thereof, become the owner of one share of capital stock in said loan [fol. 23] association for each $100.00 of the face of his loan, or any major fractional part thereof. Said capital stock in the national farm loan association so subscribed for by the applicant shall be held by said association as collateral security and for its protection under its indorsement of said loan. Further, under the provisions of Section 9 of said Federal Farm Loan Act it is provided that any person so securing a loan may, at his option, borrow from the Federal land bank through the national farm loan association the sum necessary to pay for such shares of stock subscribed for by him in the national farm loan association, such sum to be made a part of the face of the loan. That pursuant to the aforesaid provisions of said Federal Farm Loan Act the said defendants Samuel S. Warner and Lydia S. Warner, at the time of applying for said loan, did subscribe to 72 shares of the capital stock of [fol. 24] The Salt River Valley National Farm Loan Association, and did borrow from this plaintiff through the said The Salt River Valley National Farm Loan Association the sum of $360.00 necessary to pay for said shares of stock so subscribed for by them in said national farm loan association, and said sum of $360.00 was made a part of the face of the loan herein sought to be foreclosed. This plaintiff denies that said shares of stock so subscribed for by said defendants in The Salt River Valley National Farm Loan Association are held by it for collateral behind said loan, and alleges that said 72 shares of stock are held by said national farm loan association for its protection upon its indorsement of the loan of said defendants.

This plaintiff further denies that said defendants are entitled to a credit on said loan for the par value of said shares of stock of The Salt River Valley National Farm [fol. 25] Loan Association, or for a credit of the value of said shares so determined, or for any value to be credited upon said loan.

III

Replying to said defendants' fourth answer and set-off this plaintiff admits that on November 5, 1931 it received the sum of $244.35 on behalf of said defendants and admits that said defendants are entitled to a credit for this amount.

Richard W. Young, Phillips, Holzworth & Phillips,
Attorneys for Plaintiff.

Duly sworn by Milton Rygh. Jurat omitted in printing.

[fol. 26] IN SUPERIOR COURT OF MARICOPA COUNTY

DECREE IN FORECLOSURE

The above cause coming on regularly to be heard in open court this 5th day of March, 1932, before the court sitting without a jury, said cause having been duly and regularly [fol. 27] set for said date, and plaintiff, The Federal Land Bank of Berkeley, a corporation, appearing by its attorneys, Phillips, Holzworth and Phillips, and the defendants Samuel S. Warner and Lydia S. Warner, his wife, being represented by their attorney Charles Woolf, and it appearing to the court that the defendants The Salt River Valley National Farm Loan Association, a corporation, and John D. Calhoun, County Treasurer and Ex-Officio Tax Collector of Maricopa County, State of Arizona, have been duly and regularly served with the process of this court in the manner provided by law, and that said defendants have failed to appear, plead, demur or answer within the time provided by law, and that the default of each of said defendants has been duly and regularly entered by the clerk of this court; whereupon the court proceeded to the trial of this cause; and evidence, both oral and documentary, having [fol. 28] been introduced on behalf of both the plaintiff and said defendants Samuel S. Warner and Lydia S. Warner, his wife, and said matter having been argued to the court by the respective attorneys, and the court fully understanding the matter and being fully advised in the premises, finds:

1. That notice of the pendency of this action was duly recorded by the plaintiff in the Recorder's office of said Maricopa County, Arizona, on October 23, 1931.

2. That the defendants Samuel S. Warner and Lydia S. Warner, his wife, made and executed the note and mortgage as described in plaintiff's said complaint and amended complaint, and the defendant The Salt River Valley National Farm Loan Association, guaranteed the payment of the same in writing, which obligation has never been discharged.

3. That the installments of Two Hundred Thirty-Four [fol. 29] Dollars ($234.00) each that became due and owing on said note on November 1, 1930 and May 1, 1931 respectively, have not been paid. That the defendants failed to pay the state and county taxes on the property covered by said mortgage for the year 1930 and plaintiff was compelled to and did, on December 15, 1930, pay the first installment of said taxes in the sum of One Hundred Eighty-Five and 86/100 Dollars ($185.86), and was compelled to and did, on June 2, 1931, pay the second installment of said taxes in the sum of One Hundred Eighty-Five and 86/100 Dollars ($185.86). That said defendants failed and neglected to renew the fire insurance policy covering the dwelling house on said real property, and insuring the same against loss or damage by fire, and plaintiff was compelled to renew said insurance and did, on October 2, 1931, pay the sum of Thirty-two and 16/100 Dollars ($32.16) as a premium for [fol. 30] said renewal policy. That said defendants failed and neglected to pay the water charges levied and assessed against said property by the Salt River Valley Water Users' Association, and plaintiff was compelled to and did, on September 18, 1931, pay to said association the sum of Three Hundred Fifty-Six and 77/100 Dollars ($356.77), for and on account of said water charges, but that plaintiff has been fully reimbursed for said water charges. That under the terms of said mortgage plaintiff is entitled to interest on said sums of money from the respective dates on which the same were paid at the rate of eight per cent per annum. That no part of said sums has been repaid by said defendants to plaintiff, except said water charges as hereinabove set forth.

That it is provided in said mortgage that in the event of the failure of said mortgagors to pay any taxes or assess- [fol. 31] ments before the same become delinquent that the mortgagee may make said payments and the amounts so

paid shall be repayable at once without demand, and shall be secured by said mortgage.

That it is provided in said mortgage that in case of default of any of the obligations thereof the whole of the indebtedness secured by said mortgage might be declared payable and said plaintiff did, in the manner provided by law, declare the whole of said mortgage indebtedness due and payable on June 3, 1931, and duly notified said defendants herein, and said defaults were not made good as by law required.

4. That the said defendants Samuel S. Warner and Lydia S. Warner, his wife, pursuant to the provisions of the Federal Farm Loan Act, subscribed for stock in The Salt River Valley National Farm Loan Association in the amount of $360.00 and that the said The Salt River Valley National [fol. 32] Farm Loan Association, in turn, subscribed for an equal amount of stock in The Federal Land Bank of Berkeley, a corporation, plaintiff herein, which bank was the Federal Land Bank making said loan, and that the said Samuel S. Warner and Lydia S. Warner, his wife, exercised their option to borrow from The Federal Land Bank of Berkeley, through such association, the said sum of $360.00 necessary to pay for the shares of stock subscribed for by them in said The Salt River Valley National Farm Loan Association and that said sum of $360.00 was made a part of the face of the loan to be paid off in amortization payments. That said sum was deducted by plaintiff from said loan and retained by it and applied by it in payment for shares of stock purchased by the Salt River Valley National Farm Loan Association. That said defendants are entitled to an offset in the sum of $360.00 against the amount claimed by plaintiff to be due under the terms of [fol. 33] said note and mortgage.

5. That plaintiff is not entitled to include in its said judgment an attorney's fee in any amount.

6. That there remains unpaid upon said note and mortgage, which sum is now owing from the defendants who made said note and mortgage, and the defendant who guaranteed the same, the following sums:

Unpaid principal, less delinquent installments	$6,075.57
Interest thereon at 5½% per annum from May 1, 1930	617.22
Delinquent installment due November 1, 1930	234.00
Interest on said installment at 8% from said date	25.22
Delinquent installment due May 1, 1931	234.00
Interest on said installment at 8% from said date	15.86
State and County taxes for 1930, first installment	185.86
Interest thereon at 8% from December 15, 1930	18.16
State and County taxes for 1930, second installment	185.86
Interest thereon at 8% per annum from June 2, 1931	11.22
Fire Insurance premium	32.16
Interest thereon at 8% per annum from October 2, 1931	1.09

being a total of Seven Thousand Two Hundred Seventy-five [fol. 34] and 22/100 Dollars ($7,275.22) now due and owing to the plaintiff from Samuel S. Warner and Lydia S. Warner, his wife, who made said note and mortgage, and The Salt River Valley National Farm Loan Association, the defendant who guaranteed said note and mortgage, as herein found, after allowing the offset and credit of Three Hundred Sixty Dollars ($360.00) as herein provided, and that said defendants are personally liable for the debt.

That on motion of plaintiff's attorneys, said action is hereby dismissed as to First Doe, Second Doe and Third Doe.

Wherefore it is ordered, adjudged and decreed that plaintiff have judgment personally and severally against said Samuel S. Warner and Lydia S. Warner, his wife, and The Salt River Valley National Farm Loan Association, defendants, in the said sum of $7,275.22, together with inter- [fol. 35] est at the rate of five and one-half per centum per annum from the date of this decree until paid, and that the whole of said sum is a valid lien upon the land and premises and water stock in plaintiff's complaint and amended complaint, and hereinafter described and is secured by the mortgage mentioned in the complaint, and that said lien of plaintiff is prior to any lien or claim, or claims, of any of the defendants in said action.

It is further adjudged and decreed that all and singular the mortgaged premises and water stock mentioned in said complaint and amended complaint, and hereinafter described, or so much thereof as may be sufficient to raise the amount due the plaintiff in the sum of $7,275.22 as aforesaid, with interest as aforesaid, costs and accruing costs, be sold at public auction by the sheriff of Maricopa County, in the State of Arizona, in the manner prescribed by law and according to the course and practice of this [fol. 36] court, and that the said sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the said mortgaged premises and water stock; that said sheriff, out of the proceeds of said sale, retain his fees and disbursements of said sale and pay to plaintiff said sum of $7,275.22 with interest thereon as aforesaid, costs and any accruing costs, being the total amount due the plaintiff on the said note and mortgage.

It is further adjudged and decreed, that all of the right, title or interest or claim or lien in the said premises and water stock, or any portion thereof, of the defendants, and each of them, is subject to, inferior to, and subsequent to the lien of plaintiff under its mortgage, but that the lien of the plaintiff under said mortgage is subject to the lien for unpaid taxes assessed against said property herein-[fol. 37] after described, but is prior to the lien for any unpaid personal property taxes, or taxes on any other real estate.

That each of said defendants, and all persons having liens subsequent to said mortgage, their heirs, personal representatives and assigns, and all persons claiming to have acquired any estate or interest in said land and premises subsequent to the filing of said notice of the pendency of this action with the recorder, as aforesaid, be forever barred and foreclosed of and from all equity of redemption or claim of, in, or to, said mortgaged premises, and every part and parcel thereof after the delivery of said sheriff's deed.

It is further adjudged and decreed that the purchaser or purchasers of said mortgaged lands and premises at such sale be let into possession thereof, and that any person who since the commencement of this action has come [fol. 38] into possession under the defendants deliver pos-

session thereof to such purchaser or purchasers upon production of the sheriff's deed for such lands and premises, or any part thereof; and that in case the said purchaser or purchasers be refused such possession, a writ of assistance issue without further notice, requiring the sheriff of the county in which the lands are situated to place and maintain the said purchaser in the quiet and peaceable possession of the said lands and premises purchased by him, and the whole thereof.

It is further adjudged and decreed that if the moneys arising from the sale shall be insufficient to pay the amount so found due the plaintiff, as aforesaid, with interest and costs and expenses of sale, as aforesaid, the said sheriff shall specify the amount of such deficiency and balance due the plaintiff in his return of said sale, and that on the coming in and filing of said return the clerk of this court docket [fol. 39] a judgment for such balance against the defendants severally who made said note and mortgage, and who guaranteed said note and mortgage, as hereinbefore set forth.

It is further ordered, adjudged and decreed that any party to this suit may become a purchaser at said sale.

The property directed to be sold by this decree is situate in the County of Maricopa, State of Arizona, and is bounded and particularly described as follows, to-wit:

The North half of the Northwest quarter of Section 21, Township 1 South, Range 4 East, Gila and Salt River Base and Meridian, containing 80 acres, more or less.

Together with 76 shares in Salt River Valley Water Users' Association, said shares being appurtenant to the land.

Together with all other rights of every kind and nature, however evidenced, to the use of water, ditches and canals for the irrigation of said premises.

[fol. 40] Together with all tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

Done in open court this 5th day of March, 1932.

Joseph S. Jenckes, Judge.

IN SUPERIOR COURT OF MARICOPA COUNTY

MOTION FOR NEW TRIAL

Comes now the plaintiff in the above entitled action, and its attorneys of record, and moves the Court to vacate the Order for Judgment and the Judgment made herein on March 5, 1932, and to grant a new trial.

As grounds for the foregoing motion the plaintiff assigns the following causes:

1. Error in the admission of evidence offered by defendant over the objection of plaintiff.

2. That the judgment is not justified by the evidence [fol. 41] and is contrary to law.

Phillips, Holzworth & Phillips, Attorneys for Plaintiff.

IN SUPERIOR COURT OF MARICOPA COUNTY

Minute Entries

ORDER CONTINUING HEARING—November 2, 1931

Comes now the plaintiff by Phillips, Holzworth & Phillips, its Counsel. Thereupon, it is ordered by the Court continuing hearing on Order to Show Cause two weeks.

ORDER DENYING PETITION FOR APPOINTMENT OF RECEIVER—November 17, 1931

Comes now the Plaintiff by Phillips, Holzworth & Phillips, its Counsel, the Defendant appearing by Charles Woolf, his Counsel. Hearing is had on Motion for the appointment of a Receiver. It is ordered by the Court denying Petition for Appointment of Receiver.

[fol. 42] ORDER SUSTAINING DEMURRER—November 23, 1931

It is ordered by the Court sustaining Defendant's Demurrer and allowing Plaintiff twenty (20) days to amend.

ORDER DENYING MOTION TO STRIKE—January 11, 1932

Comes now the plaintiff by Phillips, Holzworth & Phillips, its Counsel, the Defendant appearing by Charles Woolf, his Counsel. Thereupon, it is ordered by the Court denying Defendant's Motion to Strike without prejudice to Defendant's raising matters presented by paragraphs 1 and 3 upon trial of the case. It is further ordered allowing 10 days in which to answer.

ORDER SETTING CAUSE—February 8, 1932

It is ordered by the Court setting this cause for trial for March 5, 1932.

ORDER GRANTING MOTION FOR ORDER REQUIRING PLAINTIFF TO PRODUCE RECORDS, ETC.—February 29, 1932

It is ordered by the Court granting Defendants' (Warner [fol. 43] et ux.) Motion for Order Requiring Plaintiff to Produce Records. It is further ordered denying Defendants' (Warner et ux.) Motion to Strike.

TRIAL—March 5, 1932

Comes now the Plaintiff by Phillips, Holzworth & Phillips, its Counsel, the Defendant appearing by Charles Woolf, his Counsel. Ralph Phillips is sworn and testifies. Plaintiff's exhibits "A", "B", "C", "D", "E", "F" and Defendants' exhibits "1", "2", "3", "4" and "5" are introduced in evidence and filed. Samuel S. Warner is sworn and testifies. Defendant's exhibit "6" introduced in evidence and filed. Thereupon it is ordered by the Court taking this matter under advisement.

JUDGMENT—March 7, 1932

This matter having been heretofore taken under advisement, it is now ordered by the Court that upon the presen- [fol. 44] tation of a formal written judgment by the Plain-

tiff, and its approval and signing by the Court, Judgment will be rendered in favor of the Plaintiff and against the Defendant as prayed for, less $360.00 claimed by defendant as offset and without attorney's fees.

ORDER DENYING MOTION FOR NEW TRIAL—March 21, 1932

It is ordered by the Court denying Plaintiff's Motion for New Trial.

ORDER STRIKING COST BILL, ETC.—April 25, 1932

It is ordered striking the Cost Bill. And it is further ordered that Defendants' (Warner et ux.) Objections to Form of Decree of Foreclosure is taken under advisement.

ORDER ON OBJECTIONS TO JUDGMENT—May 2, 1932

This matter having been previously taken under advisement, it is now ordered that Objections to Judgment are [fol. 45] sustained in part, as indicated on judgment form submitted.

ORDER EXTENDING TIME—May 25, 1932

Comes now the Plaintiff by Ralph Phillips, representing Phillips, Holzworth & Phillips, its Counsel. And thereupon, it is ordered extending time for filing transcript of Court Reporter's notes for thirty (30) days from this date.

IN SUPERIOR COURT OF MARICOPA COUNTY

NOTICE OF APPEAL

To Samuel S. Warner, also known as S. S. Warner, Lydia S. Warner, his wife, defendants, and Charles Woolf, attorney for defendants, notice is hereby given that the above

named Federal Land Bank of Berkeley, a corporation, appeals to the Supreme Court of the State of Arizona from the judgment rendered in the Superior Court of Maricopa County in the above entitled and numbered cause on the 5th day of March, 1932, and from the whole thereof.

Phillips, Holzworth & Phillips, Attorneys for Plaintiff.

[fols. 46–48] Bond on appeal for $200.00, approved May 18, 1932, omitted in printing.

[fol. 49] In Superior Court of Maricopa County

Reference to Exhibits

Plaintiff's Exhibits in Evidence

A. Promissory Note to The Federal Land Bank of Berkeley, dated November 1, 1922, signed by Samuel S. Warner and Lydia S. Warner.

B. Mortgage signed by Samuel S. Warner and Lydia S. Warner to The Federal Land Bank of Berkeley, dated November 1, 1922.

C. State and County Tax Receipt dated November 3, 1930, showing payment of taxes in amount of $185.86.

D. State and County Tax Receipt dated May 4, 1931, showing payment of taxes in amount of $185.86.

E. Receipt from Salt River Valley Water Users' Association showing payment of $356.77.

F. Receipt from Fidelity-Phenix Fire Insurance Company to The Federal Land Bank of Berkeley, dated October 6th, 1931, acknowledging receipt of $32.16.

[fol. 50] Defendants' Exhibits in Evidence

1. Photostatic copy of Check No. 3793 of The Federal Land Bank of Berkeley, dated Nov. 17, 1922, in amount of $6,819.50 payable to Arizona Title Guarantee & Trust Company for Samuel S. Warner.

2. Photostatic copy of Interest Refund Certificate dated Nov. 17, 1922.

3. Photostatic copy of Closed Loan Statement.

4. Photostatic copy of Authority to Disburse Funds, dated Nov. 28, 1922, signed by Samuel S. Warner and Lydia S. Warner.

5. Photostatic copy of Notice of Approval of Loan and Acceptance Notice of The Federal Land Bank of Berkeley.

6. Certificate No. 137. Receipt for Stock Held by Salt River Valley National Farm Loan Association.

[fol. 51] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 52] Clerk's certificate to opinion omitted in printing.

[fol. 53] IN SUPREME COURT OF ARIZONA

No. 3256

THE FEDERAL LAND BANK OF BERKELEY, a Corporation, Appellant,

vs.

SAMUEL S. WARNER, Also Known as S. S. WARNER, and LYDIA S. WARNER, His Wife, Appellees

Appeal from Superior Court of Maricopa County, Honorable Joseph S. Jenckes, Judge. Judgment Modified and Affirmed.

Phillips, Holzworth and Phillips, of Phœnix, and Richard W. Young, of Berkeley, California (of Counsel), Attorneys for Appellant.

Woolf & Carter, of Phœnix, Attorneys for Appellees.

Sanders, Childs, Bobb & Westcott, Everett Sanders and Edward F. Howrey, and Peyton R. Evans, all of Washington, D. C., and John Thorpe, of St. Paul, Minnesota, Amici Curiæ.

Ross, C. J.:

The plaintiff, The Federal Land Bank of Berkeley, on November 1, 1922, loaned the Warners, husband and wife, $7,200 on their note endorsed by the Salt River Valley National Farm Loan Association, a corporation, and secured [fol. 54] by a realty mortgage on lands situate in Maricopa County. The defendant mortgagors defaulted in the payments, also in keeping the taxes, water dues and insurance paid; hence this suit was brought to collect the note and foreclose the mortgage. The only defense was a claim to a set-off of $360. This the court allowed. The court also refused to allow the plaintiff an attorney's fee as stipulated in the mortgage. Plaintiff has appealed assigning as reasons therefor the allowance of the set-off and the refusal to allow an attorney's fee. We will consider these assignments in the order given.

If appears from the pleadings that the defendants (Warners), through the Salt River Valley National Farm Loan Association, applied to the Federal Land Bank of Berkeley for a loan, and that under instructions from them to the bank the latter paid the $7,200 borrowed from it as follows: $6,840 on defendants existing debts and $360, or 5% of loan, for borrowers membership stock in the Salt River Valley National Farm Loan Association. It is asserted by defendants that because this $360 membership fee in the association was used by the association in buying for itself an equal amount of the capital stock of the bank they should be given credit therefor.

The plaintiff and the Salt River Valley National Farm Loan Association, to which we shall refer, respectively, as the bank and the association, were organized under and pursuant to the terms and conditions of the Federal Farm Loan Act, passed by Congress July 17, 1916. Chap. 245, 39 Stat. 360; Title 12, U. S. C. A., Sec. 641 et seq. (Our references will be to U. S. C. A.) Both these corporations derive their charters and charter powers from said act. They are very essential parts of the machinery devised by the Congress [fol. 55] for the administration of a nationwide system of farm loans proposed to be set up thereby. This system consists of twelve Federal land banks for the United States, one for each of the twelve districts into which the country

has been divided. The plaintiff's district is the eleventh, composed of Arizona, California, Nevada and Utah. Each of these twelve banks is supplied with ample funds to lend the farmer who shows himself qualified to borrow. These funds are obtained by sale of the bank's capital stock, amounting to $750,000, to national farm loan associations and the government principally (Secs. 691, 692); and by the sale of farm loan bonds issued against first mortgages (Secs. 851-874).

The banks are authorized to make loans on the security of first mortgages on lands lying within their respective districts, such loans to be repaid by means of a fixed number of annual or semi-annual payments sufficient to retire the debt within an agreed period of not less than five nor more than forty years. The negotiations for loans are not carried on between the bank and the borrower but between the bank and a local farmers association representing the borrower. Ten or more natural persons who are the owners, or who are about to become the owners, of farm land qualified as security for a mortgage loan may unite to form one of these local associations and, if their application is satisfactory, the Federal Farm Loan Board will grant them a charter (Secs. 716-720).

These associations are distinct, separate, legal entities. They have a board of directors, a president, a vice president and a loan committee, and a secretary-treasurer who is the chief executive officer. They may contract debts and obligations, sue and be sued. One of the conditions of obtaining loans is that the association shall subscribe to the [fol. 56] capital stock of the bank 5% of the aggregate loans to its members, and pay the same in cash when the loans are made (Sec. 721). It shall also leave said capital stock with the bank as collateral security for the payment of loans. Upon full payment of mortgage loans this stock shall be paid off and retired. The farmer who obtains a loan from the bank through his association must subscribe 5% of his loan in the capital stock of his association and pay the same in cash (Sec. 733). This capital stock the association is authorized to hold as collateral security for the payment of loan. Upon full payment of loan the stock shall be paid off at par and retired.

Thus it is seen that the borrower is a stockholder in his association and that his association in turn is a stockholder

in the bank. The borrower is not a stockholder in the bank. The relation he and the bank sustain to each other is that of debtor and creditor and of course what he owes the bank cannot be reduced by what the association owes him or may owe him upon a settlement. The debts are not between the same persons or corporations or their assigns—an essential to the right of set-off or counterclaim.

Not only the association is obligated to the payment of the mortgage loan to the bank but all the members of the association are

"individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares" (Sec. 744).

Until the borrower redeems his membership stock in the association by the discharge of the mortgage debt he certainly has no right to have such stock, or a credit for it. Before he can claim such shares he must discharge the debt [fol. 57] for the payment of which they were pledged. To the extent of their value equity will hold and apply the borrower's shares on the debts of the association and the double liability of his fellow-stockholders in the association.

The rights of a borrower under the act in the stock of the bank subscribed for by a National Farm Loan Association were involved in Byrne v. Federal Land Bank of St. Paul, 61 N. D. 265, 237 N. W. 797, and it was there held that the borrower had no interest in said stock; that it was an asset of the association and could be applied by the bank upon what the association owed it, and that the bank's relation to the borrower was that of a creditor only. That this is the correct view we have no doubt. See, also, Gantt v. Gunter (Ala.), 145 So. 146.

The mortgage contained the following provision:

"(10) That in case of institution of suit to foreclose this mortgage, the mortgagors shall pay, as a part of the debt hereby secured, all costs and legal expense and reasonable attorney's fee to be fixed by the Court, and that said attorney's fee is and shall be a lien upon said premises and secured by this mortgage * * *."

The plaintiff asked for $125 as a reasonable attorney's fee. We think unless the act under which this system of borrowing is authorized either expressly or impliedly forbids the lender from collecting a reasonable attorney's fee for foreclosure, under the decisions and practice in this jurisdiction the contract is enforceable and plaintiff is entitled to a reasonable attorney's fee. We have frequently recognized and enforced contracts to pay attorneys' fees in foreclosure proceedings. O. S. Stapley Co. v. Rogers, 25 Ariz. 308, 216 Pac. 1072; Maxey v. Somerton State Bank, 22 Ariz. 371, 197 Pac. 894; Amirault Estate, 22 Ariz. 122, [fol. 58] 194 Pac. 1099; McClintock v. Bolton, 6 Ariz. 370, 57 Pac. 611. In this respect we are in line with the great majority of the courts. 41 C. J. 415, sec. 264. Attorneys' fees are not costs because they are not provided for or fixed by law. They are the result of contract between the parties whereby, in consideration of the mortgage loan, the mortgagor agrees to repay the principal, interest, etc., and, in case suit is brought to collect, to pay the mortgagee a reasonable attorney's fee. In other words, the mortgagor assures the mortgagee that he will be put to no outlay for attorney's fees in collecting his debt.

Section 3840, Revised Code of 1928, reads as follows:

"Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto * * *"

Counsel for plaintiff and amici curiæ argue that the word "damages" is broad enough to include an attorney's fee, and that its association with the words "debt" and "costs" shows that to be its intendment. Just what the word was intended to cover it is difficult to say. It could include taxes, water dues, insurance, or any other outlay the mortgagee is put to to protect his mortgage lien, and it might reasonably include any expenses forced on the mortgagee through default of the mortgagor, such as attorney's fees. At all events, the stipulation in the mortgage to pay an attorney's fee when it was put in there was legal, and is still legal, under the decisions and laws of this state.

While a Federal farm loan mortgage is a matter of contract between the parties, incorporated in every such contract are the terms and conditions of the Federal Farm Loan Act. The act is a part of such contract and controls [fol. 59] where there is any conflict between it, the state laws, or the contract. Scott v. Federal Land Bank, 92 Ind. App. 249, 175 N. E. 16. For instance, if the act forbids the inclusion in the mortgage contract of a stipulation to pay an attorney's fee in case of foreclosure, the stipulation would be unenforceable. The defendants contend that is the situation, whereas plaintiff and the amici curiæ contend that the limitations of the act on the costs and expenses to be charged and collected from the borrower are those for the administration of the act by the Federal Farm Loan Board and its different agencies in the process of making the loan, and in its collection through such agencies; and that such limitations do not extend to or have anything to do with the expenses of collection when resort is had to the courts.

The question is presented for the first time and involves the construction of the Federal Farm Loan Act. The language of the act nowhere specifically or directly authorizes the bank to contract for or collect an attorney's fee in case of a foreclosure, nor does it specifically forbid such contract. But that the general policy of the act is to protect the borrower and to limit the expenses incident to his loan to a minimum there can be no doubt. The central thought seems to have been the inauguration of a system of loans for the farmer, under the supervision and control of the national government, shorn of the penalties, exactions, bonuses, commissions and charges to which he had been theretofore exposed and against which he was helpless to protect himself. Every detail, from the initial application for a loan to the liquidation thereof, is under the control of the Federal Farm Loan Board and its agencies, whose duties and powers are pretty well defined. The principal of such agencies is the lending bank. Section 781 of the act provides that such bank "shall have power * * *

[fol. 60] "Ninth. * * * To charge applicants for loans and borrowers, under rules and regulations promulgated by the Federal Farm Loan Board, reasonable fees not exceeding the actual cost of appraisal and determination of

title. Legal fees and recording charges imposed by law in the State where the land to be mortgaged is located may also be included in the preliminary costs of negotiating mortgage loans. The borrower may pay such fees and charges or he may arrange with the Federal land bank making the loan to advance the same, in which case said expenses shall be made a part of the face of the loan and paid off in amortization payments. Such addition to the loan shall not be permitted to increase said loan above the limitations provided in section 771."

Thus there is conferred on the bank the right to collect from the borrower actual costs of appraising his land and determining the title thereof and other specific preliminary costs of the loan. This section limits the bank's charges against the borrower to certain specific items of costs and expenses incurred preliminary to the loan. These are initial costs. The specific grant of authority to collect these initial costs, while exclusive as to them, does not necessarily carry a denial of authority in the bank to collect from the borrower other costs or costs incident to the protection of the mortgage or its collection.

But after stating what the bank may charge to the borrower the act undertakes to state what may not be charged to him, and the language used for that purpose is very sweeping. It could not be more so. It says, in effect, that the bank is without power to demand or receive, under any form or pretext, any commission or charge not specifically authorized in the act (subdv. 5, Sec. 791). If plaintiff's position is sustained, it will have both demanded of and received from the borrower an attorney's fee. It makes no difference, however, what it is called if it is a charge or a commission. Its name or form is immaterial, as also the reason it is demanded or received. The main thing is, is it a commission or a charge. If it is the bank has no [fol. 61] power to demand or receive it. Speeter v. United States, 42 Fed. (2d) 937. No one would contend that an attorney's fee is a commission, we apprehend, and it would seem that no one would claim that an attorney's fee is not a charge. The word "charge" is very much more comprehensive than the word "commission". Commission ordinarily refers to the compensation paid to an agent or servant for services performed. As we interpret the word

"charge" or "charges" as here used, it is intended to cover any burden or exaction not specifically authorized, demanded or received by the bank from the borrower. Appraisal costs, costs of abstract of title, including a fee for its examination, and costs of recording are classed as "charges" or "fees" in subdivision ninth of Section 781, supra. They are, except the item for recording, matters of contract, just as attorney's fees are.

Section 983 contains this restriction:

"No land bank * * * shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized."

The identical thing forbidden, to wit, a fee, was contracted for in the mortgage and is now being demanded of the borrower. Such a fee is not "specifically authorized" but is inferentially forbidden by the act.

The matter of penalty for default in making payment when due is not overlooked or ignored. The act (subdv. 9, Sec. 771) provides that if payments are defaulted they shall bear 8% per annum simple interest, and that if taxes, liens, judgments or assessments are not paid the mortgagee may pay them and receive thereon 8% per annum simple interest. Thus the practice of increasing and compounding the interest on deferred payments, common to mortgages between private loan companies and borrowers, [fol. 62] was noticed and impliedly forbidden. Only simple interest may be charged. The reason the provision concerning attorney's fees, common to such mortgages, is not specifically mentioned or noticed is doubtless because the Congress believed such expense was an overhead taken care of under "administration". It would be exceedingly strange that the Congress should have taken pains to restrict and limit the expenses of the borrower in all the respects to which he had been theretofore exposed except the one of attorney's fees. The Federal Farm Loan Board is empowered and authorized to employ a permanent staff of attorneys, experts, assistants, etc., and to fix their compensation (Sec. 659). The Federal land banks have authority to elect their officers and appoint their employees and define their duties (Sec. 676), also to fix their compensation, subject to the approval of the Federal Farm Loan Board (Sec. 683). The failure of the act to specifi-

cally authorize the bank to contract with the borrower for an attorney's fee would lead one to believe that the Congress probably intended the bank's permanent staff of attorneys should perform that service.

In addition to the preliminary costs and expenses that may be collected from the borrower, as provided in Section 781, supra, it is specifically provided in subdivision second of Section 771:

"Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan * * * second, a charge for administration and profits at a rate not exceeding 1 per centum per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage; * * * *"

This one per centum for "administration and profits" the bank is specifically authorized to collect from the bor- [fol. 63] rower. Plaintiff and amici curiæ would restrict the meaning of the word "administration" to the act of collecting the interest on the mortgage and the amortized payments on the principal, so long as they were voluntarily made by the borrower, and stop there. They seem to claim that when the borrower defaults in his payments, and resort must be had to the courts, administration ceases in the sense used in this act. In other words, that the one per centum on the unpaid principal, while covering "profits", does not cover the entire "administration".

The plaintiff and amici curiæ take the position that this form of contract has been in use by all the different farm banks for some sixteen years, with the authority and approval of the Federal Farm Loan Board; that Sections 971-973 of the act make it the duty of the farm loan commissioner to investigate the laws of the states and report to the board; and the board is forbidden to make any loans in any state unless the laws

"are such as to assure the holder thereof (of mortgage) adequate safeguards against loss in the event of default on loans secured by any such mortgages."

For these reasons, they say, the board's interpretation of the law should be followed "unless convincing reason to the contrary is found in the language or purpose of the enactment". We agree with this rule of interpretation, but think

both the language of the act and its purpose forbid the contract for attorney's fees.

It is also said if plaintiff is not allowed to collect an attorney's fee the bank will sustain a "loss", contrary to the manifest intention of Sections 971-973. This depends. If the act permits the making of the contract with the mortgagor for an attorney's fee, then the deduction is correct, [fol. 64] but if it forbids such a contract then nothing is either lost or gained by its rejection.

They also seem to place some sanctity or virtue in the first sentence of Section 642, reading as follows:

"Wherever the term 'first mortgage' is used in this Chapter it shall be held to include such classes of first liens on farm lands as shall be approved by the Federal Farm Loan Board, and the credit instruments secured thereby."

This language defines a first mortgage and makes it a prerequisite that it shall be approved by the Federal Farm Loan Board, but we do not understand therefrom that such approval would make legal unauthorized or illegal conditions inserted therein.

We conclude that the cause should be remanded with directions to modify the judgment by adding thereto the item of $360 allowed as a set-off; and that as thus modified the judgment should be affirmed.

Henry D. Ross, Chief Justice.

Concurring: A. G. McAlister, Associate Justice. Fred W. Fickett, Superior Judge.

Note.—On account of the illness of Judge Lockwood, Honorable Fred W. Fickett, Judge of the Superior Court of Pima County, was called to sit in this case.

[fol. 65] In Supreme Court of Arizona

Mandate

(Seal.)

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa, Greeting:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between The Federal Land Bank of Berkeley, a

corporation, Plaintiff, vs. Samuel S. Warner, also known as S. S. Warner, and Lydia S. Warner, his wife, Defendants, No. 35727, the said superior court made and entered its judgment, on the 5th day of March, 1932, being a decree of foreclosure on the mortgaged premises described therein, an order refusing to allow plaintiffs an attorneys' fee in the case, and the allowance to defendants of a set-off of [fol. 66] $360.00 as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiff agreeably to the law in such case made and provided fully and at large appears.

[fol. 67] And whereas, in May, in the year of our Lord one thousand nine hundred and thirty-three, the said cause came on to be heard before the said Supreme Court and was submitted for decision after oral argument.

On consideration whereof, it was on the first day of July, in the year of our Lord one thousand nine hundred and thirty-three, ordered by this Court that the judgment of the said Superior Court in this cause, dated March 5th, 1932, be, and the same is hereby modified by adding thereto the item of $360.00 allowed as a set-off, and that, as thus modified, the judgment is affirmed. Ordered further that the Federal Land Bank of Berkeley, a corporation, appellant herein, recover its costs in this court of and from said appellees, Samuel S. Warner et al.

[fol. 68] You therefore are hereby commanded that such proceedings be had in said cause, as according to right and justice, and to law, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Henry D. Ross, Chief Justice of the Supreme Court of the State of Arizona, the seventeenth day of July, in the year of our Lord one thousand nine hundred and thirty-three.

Eugenia Davis, Clerk of the Supreme Court of the State of Arizona.

Costs of Appellant (no cost bill filed).

[Endorsed:] No. 3256. Supreme Court of the State of Arizona. The Federal Land Bank of Berkeley, a corporation, appellant, vs. Samuel S. Warner et al., appellees. Copy of mandate. Issued 7/17, 1933.

Certificate

State of Arizona,
Supreme Court, ss:

I, Eugenia Davis, Clerk of the Supreme Court of the State of Arizona, do hereby certify and attest the within and following to be a full, true, and correct copy of the original Mandate of this court issued to the trial court on the 17th day of July, 1933, in Case No. 3256, The Federal Land Bank of Berkeley, a corporation, Appellant, v. Samuel S. Warner et al., Appellees, duplicate of which is on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Phœnix, this 26th day of September, 1933.

Eugenia Davis, Clerk, Supreme Court of the State of Arizona. (Seal Supreme Court, State of Arizona.

Endorsed on cover: File No. 38,101. Arizona Supreme Court. Term No. 498. The Federal Land Bank of Berkeley, petitioner, vs. Samuel S. Warner et ux. et al. Petition for a writ of certiorari and exhibit thereto. Filed September 30, 1933. File No. 498 O. T. 1933.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 20, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Arizona is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
SEP 30 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 498

THE FEDERAL LAND BANK OF BERKELEY,
A CORPORATION, PETITIONER,

vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA AND BRIEF IN SUPPORT THEREOF.

RICHARD W. YOUNG,
Berkeley, California,
PEYTON R. EVANS,
MAY T. BIGELOW,
Washington, D. C.,
Attorneys for Petitioner.
HERMAN OLIPHANT,
Washington, D. C.,
Of Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No.

THE FEDERAL LAND BANK OF BERKELEY,
A CORPORATION, PETITIONER,

vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Federal Land Bank of Berkeley, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Arizona, being the court of last resort of said State, in the above entitled action, the opinion and decision of said court having been rendered and filed on July 1, 1933; by which decision the said court modified in part and affirmed in part a foreclosure decree of the Superior Court of Maricopa County, State of Arizona. This petition has to do with that part of the decision of the Supreme Court of Arizona which affirms the lower court's decree.

Statement of Facts.

The petitioner is one of the twelve Federal land banks chartered by the Federal Farm Loan Board under the provisions of an Act of Congress approved July 17, 1916, and Acts amendatory thereto, known and cited as the Federal Farm Loan Act (12 U. S. C. ch. 7). The petitioner is authorized and empowered to operate and do business in the Eleventh Federal Land Bank District comprising the States of Arizona, California, Nevada and Utah. The business of the petitioner is to make loans to farmers and to take as security therefor first mortgages on farm lands duly qualified under the provisions of the said Federal Farm Loan Act.

On November 1, 1922, the respondents, Samuel S. Warner and Lydia S. Warner, his wife, executed and delivered to this petitioner their certain promissory note in the principal amount of $7,200, together with their mortgage covering certain real property situate in Maricopa County, State of Arizona, as security for the payment of said note. The mortgage agreement so executed and delivered by these respondents contained the following stipulation:

> "(10) That in case of institution of suit to foreclose this mortgage, the mortgagors shall pay, as a part of the debt hereby secured, all costs and legal expenses and reasonable attorney's fee to be fixed by the Court, and that said attorney's fee is and shall be a lien upon said premises and secured by this mortgage * * *"

The respondents having defaulted in the payments provided for in the aforesaid promissory note, this action to foreclose the mortgage was begun in the Superior Court of Maricopa County, Arizona. The petitioner, in its foreclosure complaint, asked for a reasonable attorney's fee of

$125 under the provisions of the aforesaid stipulation contained in paragraph 10 of the mortgage agreement. Petitioner in its complaint averred that "The whole of said fee, if allowed by the court, is to be paid to and be retained by the attorneys of record in this case." The reasonableness of this amount, no part of which was sought by petitioner for any purpose other than the actual payment of its counsel fees, was not at any time disputed.

The respondents in their answer admitted the execution and delivery of the aforesaid promissory note and mortgage, but denied that the petitioner was entitled to any attorney's fee for the reason that the stipulation contained in paragraph 10 was unenforceable in that it was in violation of and prohibited by the provisions of the Federal Farm Loan Act, as amended.

The trial court denied an attorney's fee to the petitioner and this petitioner appealed to the Supreme Court of Arizona, the court of last resort in the State, from such decision. The appeal came on for hearing and the Supreme Court of the State of Arizona, on July 1, 1933, affirmed the decision of the Superior Court of Maricopa County to the effect that the Federal Farm Loan Act forbids a Federal land bank from recovering the amount of the fee to be paid to its attorney in the event of the foreclosure of its mortgages. The opinion below, which has not yet been reported, is set forth in the record.

Question Presented.

The question involved is whether or not the provisions of the Federal Farm Loan Act prohibit a Federal land bank from recovering an attorney's fee in the event of the foreclosure of a mortgage, and thereby invalidate a specific stipulation in the mortgage that the mortgagor shall

pay such fee, where there is no State statute or law prohibiting the inclusion of such stipulation in the mortgage agreement.

Statutes Involved.

Federal Farm Loan Act (12 U. S. C., ch. 7).

Emergency Farm Mortgage Act of 1933, which is Title II of the Agricultural Adjustment Act of May 12, 1933, Public Law No. 10, 73d Congress; 48 Stat. 41 *et seq.*

Specification of Error to be Urged.

The Supreme Court of Arizona erred in sustaining the holding of the Superior Court of Maricopa County of Arizona to the effect that this petitioner was not entitled to a reasonable attorney's fee in its decree foreclosing the mortgage agreement between the petitioner and the respondents, on the ground that the Federal Farm Loan Act prohibits the Federal land bank from recovering such a fee.

Practical Importance of Legal Question.

The question raised is one of general and significant importance to the petitioner and to the other eleven Federal land banks, and to some forty-nine joint stock land banks, chartered under the Federal Farm Loan Act, in that:

1. The twelve Federal land banks now hold farm mortgages in an approximate amount of $1,120,000,000. The joint stock land banks hold farm mortgages in an approximate amount of $500,000,000. Except in a very few States where local law prohibits such contracts, all of these mortgages (or trust deeds) contain stipulations or provisions generally similar in form and effect to paragraph 10 of the mortgage foreclosed in this action, and providing for the payment by the mortgagors of an attorney's fee in the event

of foreclosure. Under the recent Emergency Farm Mortgage Act of 1933 (May 12, 1933), the Federal land banks are authorized to expand immediately their activities to the extent of $2,000,000,000 in additional farm mortgage financing operations. The mortgage agreements to be taken as security behind this tremendous program of new financing by the land banks will contain provisions and stipulations providing for the payment of an attorney's fee by the mortgagors in the event of default in the mortgage agreement and the institution of foreclosure proceedings. It is of particular importance, therefore, that the question involved in this case be decided by the United States Supreme Court.

2. The mortgages taken by the Federal and joint stock land banks from their respective borrowers under the terms of the Federal Farm Loan Act, and those to be taken under the Emergency Farm Mortgage Act of 1933, constitute or will constitute solemn contracts between the borrowers and the banks. Under the terms of the Federal Farm Loan Act the bonds issued by the banks are secured by these mortgages and if the decision of the lower court should be sustained the security back of the bonds will be materially impaired inasmuch as the banks would be compelled to bear the burden of paying attorney's fees upon foreclosure of the mortgages.

3. The question involved herein has never been passed upon heretofore by this Court or by any Federal court or by any court of last resort of any other State to the knowledge of this petitioner, and it therefore becomes one of first instance and of extreme importance in guiding this petitioner and the other Federal land banks in carrying out and putting into effect the program of refinancing a large portion of the nation's farm mortgage debt.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Arizona, commanding that court to certify and forward to this Court a full and complete transcript of the record in the proceeding in said Supreme Court had in the case numbered and entitled on its docket, No. 3256, The Federal Land Bank of Berkeley, a corporation, Appellant, vs. Samuel S. Warner, *et ux. et al.*, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that petitioner may have such other and further relief in the premises as this Court may deem proper.

THE FEDERAL LAND BANK OF BERKELEY,
By RICHARD W. YOUNG,
Berkeley, California.
PEYTON R. EVANS,
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Washington, D. C.,
Attorneys for Petitioner.
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Washington, D. C.,
Of Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No.

THE FEDERAL LAND BANK OF BERKELEY,
A CORPORATION, PETITIONER,

vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction of this Court.

1. The jurisdiction of this Court is invoked under 28 U. S. C. 344(*b*) (Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stat. 938).

2. This case involves the question as to whether or not the provisions of the Federal Farm Loan Act, 12 U. S. C., chap. 7, prohibit a Federal land bank from recovering an attorney's fee in the event of the foreclosure of a mortgage when such mortgage itself contains a specific stipulation on the mortgagor's part that the latter will pay such attor-

ney's fee, and where there is no State statute or law prohibiting the inclusion of such stipulation in the mortgage agreement. This question is presented in this case for the first time and involves the correct interpretation of the provisions of the aforesaid Federal Farm Loan Act. This decision of the Supreme Court of Arizona involves an important and substantive question of Federal law which has not been, but which petitioner believes should be, settled by this Court.

II.

Statement of Facts.

The facts in this case have already been stated in the preceding petition under the heading "Statement of Facts," pages 2 to 3, which are hereby adopted and made a part of this brief.

III.

Assignment of Error Intended to be Urged.

The final decision and judgment of the Supreme Court of Arizona is erroneous in that it construes and interprets the Federal Farm Loan Act, 12 U. S. C., chap. 7, as prohibiting and denying the petitioner and the respondents the right to include in the mortgage agreement a stipulation to the effect that the mortgagors shall pay an attorney's fee in the event of the default of the latter in carrying out the terms, conditions, and covenants of the mortgage agreement, and that, therefore, under such Federal statute this petitioner cannot recover any attorney's fee when the mortgage is foreclosed.

IV.

Summary of Argument.

1. It was the intention of Congress under the Federal Farm Loan Act that the status of mortgage liens accepted

by the Federal land banks, and the procedure to be followed in case of foreclosure and the subsequent rights of the parties to such foreclosure proceedings, should be fixed by the laws of the State in which the mortgaged premises are situated (12 U. S. C., Secs. 971, 972).

2. A stipulation in a mortgage agreement that the mortgagor shall pay an attorney's fee in the event of foreclosure is legal and enforceable under the laws of the State of Arizona and the decisions of the Supreme Court of Arizona. The Supreme Court of the State of Arizona so held in this decision.

3. The provisions of Sections 771, 781, and 791 of 12 U. S. C., respecting fees and charges which a Federal land bank is allowed to make and collect are inapplicable to the question involved in this assignment of error. These provisions of the Federal Farm Loan Act have to do only with fees and charges incident to negotiating, making and carrying mortgage loans. They are in no way connected with the proper damages and costs which may be recovered by a Federal land bank to indemnify it for the expense and cost incident to enforcing the legal remedies available to a mortgagee.

4. Under Sections 642, 771, 971, and 972, of Title 12, U. S. C., this petitioner and the other Federal land banks are permitted to protect themselves against loss in the case of default under any mortgage.

5. Under Section 676, *Fourth,* of 12 U. S. C., this petitioner is expressly empowered "to sue and be sued, . . . in any court of law or equity, as fully as natural persons", and is therefore entitled to an award of attorney fees in a foreclosure action brought in an Arizona court.

V.

ARGUMENT.

Section 971 of Title 12, U. S. C., provides as follows:

> "It shall be the duty of the Farm Loan Commissioner to make examination of the laws of every State of the United States and to inform the Federal Farm Loan Board as rapidly as may be whether in his judgment the laws of each State relating to the conveying and recording of land titles, *and the foreclosure of mortgages or other instruments securing loans, * * * are such as to assure the holder thereof adequate safeguards against loss in the event of default on loans secured by any such mortgages.*" (Italics ours.)

Section 972 then provides that until such examination is made of the laws of any State in which a Federal land bank is to make loans, and until such laws are found satisfactory in the judgment of the Farm Loan Commissioner to protect the bank against loss in the event of default on loans secured by any such mortgages, that mortgages taken by the bank in such State are ineligible as the basis for an issue of farm loan bonds. This section further provides that if the laws of any such State afford insufficient protection to the mortgagee any mortgage taken on land in such State shall be ineligible during the continuance of the laws in question.

Under the provisions of the Act as above referred to this petitioner, and every other Federal land bank, is authorized to safeguard itself against loss by including in its mortgages proper and adequate provisions for the collection of reasonable attorney fees in case of foreclosure. Only in this way can these banks be protected and safeguarded against the loss and expense which they would have to

suffer in the event of defaults in their mortgages and foreclosure having to be resorted to.

In the face of the above mentioned provisions of the Act it was held by the court below that this petitioner is prohibited from recovering an attorney's fee in the foreclosure proceedings instituted against these respondents by reason of the prohibition contained in the "Fifth" paragraph of Section 791 of 12 U. S. C., namely, that no Federal land bank shall have the power "To demand or receive, under any form or pretense, any commission or charge not specifically authorized in this Act"; and that the bank is not specifically authorized to recover such a fee under the provisions of the Act.

It is apparent from a study of the provisions of Sections 771 and 781 of 12 U. S. C., that the interest, fees and charges therein specifically authorized are those incidental to negotiating and carrying mortgage loans. Such fees and charges only have to do with transactions prior to and during the life of the loan contract. They are in no way connected with the proper damages and costs which may be recovered by the bank to indemnify it for the expense and cost incident to enforcing its legal remedies after default. The limitations of the law respecting fees and charges are designed to protect borrowers under the Land Bank System from unjust charges connected with the making and carrying of their loans.

The court below relied also upon Section 983 of 12 U. S. C., which prohibits and penalizes the charging or receiving of "any fee, commission, bonus, gift or other consideration not herein specifically authorized." It is submitted, however, that these terms relate to charges for the extension of leniency or forbearance, or for the rendition of some service by one party to another. It is the compensation allowed for such service or forbearance (1 Bouvier's

Law Dictionary, p. 548). An attorney's fee when stipulated for in a mortgage is not a "commission or charge." It is not compensation for the rendering of service by the mortgagee to the mortgagor. It is an indemnity or item of special damage to which the mortgagee is entitled because of the default of the mortgagor under his contract, and the expense resulting to the mortgagee in the enforcement of its legal remedy. (*Wilson Sewing Machine Co.* v. *Moreno*, 7 Fed. 806; *Missouri, K. & T. R. Co.* v. *Cade*, 233 U. S. 642, 34 Sup. Ct. Rep. 678.)

In other words, the prohibitions contained in Sections 791 and 983 refer only to transactions between the bank and the borrower leading up to the making of the loan, or to services and forbearances extended by the bank to the borrower during the life of the contract. An attorney's fee is not a consideration for services rendered by the bank to a borrower. In reality it is not a fee at all. It is an expense necessarily incident to the remedy. The right of a mortgagee to demand indemnity against such expense by a covenant in the mortgage deed, and to enforce such covenant, is a part of the remedy. Under the procedure in most States, such provision is for reimbursement of the mortgagee for the amount which he has been compelled to incur in fees to his attorney for the enforcement of the remedy; while in a few States the same end is achieved under a different practice by indemnifying the mortgagee against the incurring of an expense for attorney's fees, the expense in such States being met by the mortgagor direct, and the award or judgment running in favor of the attorney.

Each Federal land bank is expressly vested with power "to sue and be sued, complain, interplead, and defend, in any court of law or equity, as fully as natural persons."

(12 U. S. C., 676, *Fourth*). In the instant case, the Federal Land Bank of Berkeley, in the exercise of this power, sued the defendants in an Arizona court. Had the suit been brought by a natural person, such person would have been entitled, as above stated, to an award of attorney fees, under the law of the State of Arizona. It is submitted that such award is an incident to the remedy of foreclosure, and, under the provision just quoted, is available to this petitioner "as fully as natural persons."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 498

THE FEDERAL LAND BANK OF BERKELEY,
A CORPORATION, PETITIONER,

vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA.

BRIEF ON BEHALF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 498

THE FEDERAL LAND BANK OF BERKELEY,
A CORPORATION, PETITIONER,

vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

BRIEF ON BEHALF OF PETITIONER.

I

Statement of the Case.

1. *Jurisdiction of This Court.*

The jurisdiction of this Court is invoked under Section 344 (*b*), Title 28, U. S. C. (Judicial Code, § 237). The title, rights, privileges, and immunities especially set up and claimed by both parties to be cause are based upon, and governed by, a statute of the United States; that is, the Federal Farm Loan Act. The Supreme Court of Arizona, the highest court of that State, has rendered a final judgment in the cause. (*Federal Land Bank of Berkeley* v. *Warner*, 23 P. (2d) 563.)

2. *Nature of the Proceedings Below.*

This was a suit instituted in the Superior Court of Maricopa County, Arizona, by the Federal Land Bank of Berkeley, hereinafter referred to as the petitioner, and Samuel S. Warner, *et al.*, hereinafter referred to as the respondents, to foreclose a mortgage given by the respondents to the petitioner to secure a loan in the principal sum of $7,200.

3. *History and Facts of Case Below.*

The petitioner is one of the twelve Federal land banks chartered by the Federal Farm Loan Board[1] under the provisions of an Act of Congress approved July 17, 1916, and Acts amendatory thereto, known and cited as the Federal Farm Loan Act (12 U. S. C., ch. 7). The petitioner is authorized and empowered to operate and do business in the Eleventh Federal Land Bank District comprising the States of Arizona, California, Nevada and Utah. The business of the petitioner is to make loans to farmers and to take as security therefor first mortgages on farm lands duly qualified under the provisions of the said Federal Farm Loan Act.

---

[1]The Farm Loan Board consisted of the Secretary of the Treasury and six members, to be appointed by the President, Section 3; 12 U. S. C., Section 652. After the entry of the final judgment in this cause, the Federal Farm Loan Board was abolished and its functions were transferred to the Farm Loan Commissioner, subject to the jurisdiction and control of the Farm Credit Administration, by Executive Order of the President, No. 6084 of March 27, 1933; the name of the office of the Farm Loan Commissioner was afterward changed to that of Land Bank Commissioner, by Act of June 16, 1933, Session Laws, First Session 1933, 273.

Federal Land Bank of Columbia v. *Gaines*, No. 112, October Term, 1933.

On November 1, 1922, the respondents, Samuel S. Warner and Lydia S. Warner, his wife, executed and delivered to this petitioner their certain promissory note in the principal amount of $7,200, together with their mortgage covering certain real property situate in Maricopa County, State of Arizona, as security for the payment of said note. The mortgage agreement so executed and delivered by these respondents contained the following stipulation:

> "(10) That in case of institution of suit to foreclose this mortgage, the mortgagors shall pay, as a part of the debt hereby secured, all costs and legal expenses and reasonable attorney's fee to be fixed by the Court, and that said attorney's fee is and shall be a lien upon said premises and secured by this mortgage * * *."

The respondents having defaulted in the payments provided for in the aforesaid promissory note, this action to foreclose the mortgage was begun in the Superior Court of Maricopa County, Arizona. The petitioner, in its foreclosure complaint, asked for a reasonable attorney's fee of $125 under the provisions of the aforesaid stipulation contained in paragraph 10 of the mortgage agreement. Petitioner in its complaint averred "That the whole of said fee, if allowed by the Court, is to be paid to and be retained by the attorneys of record in this case." (R. 4.) The reasonableness of this amount, no part of which was sought by petitioner for any purpose other than the actual payment of its counsel fees, was not at any time disputed.

The respondents in their answer admitted the execution and delivery of the aforesaid promissory note and mortgage, but denied that the petitioner was entitled to any attorney's fee. Such denial was based upon the claim that the stipulation contained in paragraph 10 was unenforceable in that it was in violation of and prohibited by the provisions of the Federal Farm Loan Act, as amended.

The trial court, in its decree of foreclosure (R. 13), denied an attorney's fee to the petitioner and this petitioner took an appeal from this decision to the Supreme Court of Arizona, that being the court of last resort in the State. The appeal came on for hearing and the Supreme Court of the State of Arizona, on July 1, 1933, affirmed the decision of the Superior Court of Maricopa County to the effect that the Federal Farm Loan Act forbids a Federal land bank from recovering a reasonable fee to be paid to its attorney in the event of the foreclosure of one of its mortgages. The opinion below is set forth in the record (R. 22). (*Federal Land Bank of Berkeley* v. *Warner*, — *Ariz.* —; 23 P. (2d) 563.)

II.

Specification of Error to Be Urged.

The final decision and judgment of the Supreme Court of Arizona is erroneous in that it construes and interprets the Federal Farm Loan Act, 12 U. S. C. ch. 7, as prohibiting and denying the petitioner and the respondents the right to include in the mortgage agreement a stipulation to the effect that the mortgagors shall pay an attorney's fee in the event of the default of the latter in carrying out the terms, conditions, and covenants of the mortgage agreement and that, therefore, under such Federal statute this petitioner cannot recover any attorney's fee when the mortgage is foreclosed.

III.

The Question Presented.

The question involved is whether the provisions of the Federal Farm Loan Act, either expressly or impliedly, forbid a Federal land bank from collecting a reasonable attorney's fee in the event of the foreclosure of one of its

mortgages, if such fee may be collected under the decisions and practice of the jurisdiction in which the mortgaged contract is enforceable.

IV.

Summary of Argument.

1. It was the intention of Congress under the Federal Farm Loan Act that the status of mortgage liens accepted by the Federal land banks, and the procedure to be followed in case of foreclosure and the subsequent rights of the parties to such foreclosure proceedings, should be fixed by the laws of the State in which the mortgaged premises are situated (12 U. S. C. §§ 971, 972).

2. A stipulation in a mortgage agreement that the mortgagor shall pay an attorney's fee in the event of foreclosure is legal and enforceable under the laws of the State of Arizona and the decisions of the Supreme Court of Arizona. The Supreme Court of the State of Arizona so held in this decision.

3. The provisions of sections 771, 781, 791 and 983 of 12 U. S. C., respecting fees and charges which a Federal land bank is allowed to make and collect, are inapplicable to the question involved in this assignment of error. These provisions of the Federal Farm Loan Act have to do only with fees and charges incident to negotiating, making and carrying mortgage loans. They are in no way connected with the proper damages and costs which may be recovered by a Federal land bank to indemnify it for the expense and cost incident to enforcing the legal remedies available to a mortgagee.

4. Under sections 642 and 781, 971 and 972 of Title 12, U. S. C., this petitioner and the other Federal land banks

are permitted and authorized to protect themselves against loss in the case of default under any mortgage.

5. Under Section 676, *Fourth*, of 12 U. S. C., this petitioner is expressly empowered "To sue and be sued, * * * in any court of law or equity, as fully as natural persons", and is therefore entitled to an award of attorney fees in a foreclosure action brought in an Arizona court.

V.

ARGUMENT.

1. It was the intention of Congress under the Federal Farm Loan Act that the status of mortgage liens accepted by the Federal Land Banks, and the procedure to be followed in case of foreclosure and the subsequent rights of the parties to such foreclosure proceedings, should be fixed by the laws of the State in which the mortgaged premises are situated (12 U. S. C., Sections 971, 972).

Section 30 of the Federal Farm Loan Act (Section 971 of Title 12, U. S. C.) provides in part as follows:

> "It shall be the duty of the Farm Loan Commissioner to make examination of the laws of every State of the United States and to inform the Federal Farm Loan Board as rapidly as may be whether in his judgment the laws of each State relating to the conveying and recording of land titles, *and the foreclosure of mortgages or other instruments securing loans*, * * * are such as to assure the holder thereof adequate safeguards against loss in the event of default on loans secured by any such mortgages." (Italics added.)

The same section (§ 972) provides further that until such examination of the laws of any particular State is made by the Farm Loan Commissioner as provided in section 971, and until such laws are found satisfactory in the judg-

ment of said Commissioner to protect the Federal land bank against *loss in the event of default* on loans secured by any such mortgages, that mortgages taken by the bank in such State are ineligible as the basis for an issue of farm loan bonds. In order for the Farm Loan Commissioner to determine whether or not the laws of any particular State were such as to assure the bank of adequate safeguards against loss in the event of default on the loans which it might take secured by such mortgages the Commissioner was empowered to use the office of the Attorney General of the United States or to employ special counsel in any State for the purpose of giving him the needed legal advice or assistance as to the sufficiency of such State laws to protect the bank and its mortgages.

In section 973 of the Act it is provided that in the event the Commissioner shall find the laws of any State are not such as to assure adequate safeguards against loss in the event of default on loans secured by the bank mortgages, and at the request of the Executive of such State, the Federal Farm Loan Board shall prepare a statement setting forth in what respect the requirements of said Board cannot be complied with under the existing laws of said State.

In other words, the provisions of sections 971, 972 and 973 are explicit in requiring that the laws of any State in which any Federal land bank may make loans shall be sufficient to assure protection to the mortgages which the bank may take and to insure the bank against any loss in the event of default on its loans. If any such State is found in which the laws are not adequate to assure such safety then the Chief Executive of the State may request the Federal Farm Loan Board to have such deficiencies in the laws of the State pointed out to him in order that he and the State Legislature may have such amendments made thereto as will be sufficient to give the farmers in his State the ad-

vantages of borrowing from the Federal land bank of the district in which said State is situated.

It is clear from these provisions of the Act that they have to do with the question whether the Farm Loan Board considers that land banks are adequately secured so far as the laws of a particular State are concerned. It is purely a matter resting in the discretion of the Board as to whether the laws of such State are adequate to assure a Federal land bank protection against loss in the event of default on loans. It is clear also that it was the intention of the Congress that the status of mortgage liens accepted by the Federal land banks, the procedure to be followed in case of foreclosure, and the subsequent rights and remedies of the parties to such foreclosure proceedings are to be governed by the laws of the State in which the mortgaged premises are situated, and not by the Federal Farm Loan Act.

The provision in a mortgage for the payment by the mortgagor of a reasonable attorney's fee as a part of the remedy, in the event the mortgagee is compelled to foreclose his mortgage, comes within the category and the phraseology used in section 971 of the Act as above referred to. It is one of the safeguards provided by State law against loss to the mortgagee in the event of default by the mortgagor. An attorney's fee in case of foreclosure is not a cause of action, but, like the cost of the suit, it is an important part of the remedy afforded by the cause of action. It is in the nature of an indemnity or damages to the mortgagee for expenditures necessarily made by him to protect his interests under the mortgage agreement.

> "An agreement by a debtor to pay a reasonable attorney fee in case his creditor is compelled to incur the expense of an action to collect the debt, *is only an agreement to so far reimburse the creditor the loss which he may sustain by reason of the debtor's failure*

to perform his contract to pay his debt. In justice and fairness it stands on as high ground as the right to recover damages for the non-performance of any contract; as to deliver grain or goods at a certain time and place." (Italics added.)

Wilson Sewing Machine Co. v. *Moreno* (C. C. Oregon, 1879), 7 Fed. 806, 809, 810.

"The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle. 2 Bacon, Abr., title costs. Numerous cases in the state courts have sustained similar legislation. *Vogel* v. *Pekoc*, 157 Ill. 339, 344, 346, 30 L. R. A. 491, 42 N. E. 386; *Burlington, C. R. & N. R. Co.* v. *Dey*, 82 Iowa 312, 340, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; *Cameron* v. *Chicago, M. & St. P. R. Co.*, 63 Minn. 384, 388, 31 L. R. A. 553, 65 N. W. 652; *Wortman* v. *Kleinschmidt*, 12 Mont. 316, 330, 30 Pac. 280. *If a reasonable penalty may be imposed for failure to satisfy a demand found to be just it follows a fortiori that costs and an attorney's fee may be.* See *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 105, 43 L. ed. 909, 913, 19 Sup. Ct. Rep. 609; *Farmers' & M. Ins. Co.* v. *Dobney*, 189 U. S. 301, 304, 47 L. ed. 821, 825, 23 Sup. Ct. Rep. 565." (Italics added.)

Missouri, K. & T. R. Co. v. *Cade*, 233 U. S. 642, 34 Sup. Ct. Rep. 678.

2. A stipulation in the mortgage agreement that the mortgagor shall pay an attorney's fee in the event of foreclosure is legal and enforceable under the laws of the State of Arizona and the decisions of the Supreme Court of Arizona.

The opinion of the Supreme Court of Arizona in this case so held. The Court stated (R. 25):

"We have frequently recognized and enforced contracts to pay attorneys' fees in foreclosure proceedings. *O. S. Stapley Co.* v. *Rogers*, 25 Ariz. 308, 216 Pac. 1072; *Maxey* v. *Somerton State Bank*, 22 Ariz. 371, 197 Pac. 894; *Amirault Estate*, 22 Ariz. 122, 194 Pac. 1099; *McClintock* v. *Bolton*, 6 Ariz. 370, 57 Pac. 611. In this respect we are in line with the great majority of the courts. 41 *C. J.* 415, sec. 264. Attorneys' fees are not costs because they are not provided for or fixed by law. They are the result of contract between the parties whereby, in consideration of the mortgage loan, the mortgagor agrees to repay the principal, interest, etc., and, in case suit is brought to collect, to pay the mortgagee a reasonable attorney's fee. In other words, the mortgagor assures the mortgagee that he will be put to no outlay for attorney's fees in collecting his debt. * * * the stipulation in the mortgage to pay an attorney's fee when it was put in there was legal, and is still legal, under the decisions and laws of this state."

3. The provisions of Sections 771, 781, 791, and 983 of 12 U. S. C., respecting fees and charges which a Federal land bank is allowed to make and collect, are inapplicable to the question involved in this assignment of error. These provisions of the Federal Farm Loan Act have to do only with fees and charges incident to negotiating, making, and carrying mortgage loans. They are in no way connected with the proper damages and costs which may be recovered by a Federal land bank to idemnify it for the expense and cost incident to enforcing the legal remedies available to a mortgagee.

The Supreme Court of the State of Arizona bases its conclusion in denying an attorney's fee to this petitioner upon the language contained in Sections 771, 781, 791 and 983 of the Act.

The particular language in each of the foregoing sections which is specifically referred to by the Supreme Court of Arizona in its opinion is as follows:

SECTION 771. "Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan * * *; second, a charge for administration and profits at a rate not exceeding 1 per centum per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage; * * *"

SECTION 781. "Every Federal land bank shall have power, subject to the limitations and requirements of this Act—

"Ninth. * * * To charge applicants for loans and borrowers, under rules and regulations promulgated by the Federal Farm Loan Board [Farm Credit Administration], reasonable fees not exceeding the actual cost of appraisal and determination of title. Legal fees and recording charges imposed by law in the State where the land to be mortgaged is located may also be included in the preliminary costs of negotiating mortgage loans. The borrower may pay such fees and charges or he may arrange with the Federal land bank making the loan to advance the same, in which case said expenses shall be made a part of the face of the loan and paid off in amortization payments. Such addition to the loan shall not be permitted to increase said loan above the limitations provided in 12 U. S. C. 771."

SECTION 791. "No Federal land bank shall have power—

"Fifth. * * * To demand or receive, under any form or pretense, any commission or charge not specifically authorized in this Act."

SECTION 983. * * * "No land bank * * * shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized."

It is apparent from a study of the provisions of said Sections 771 and 781 of the Act that the interest, fees and charges therein specifically authorized are those which are incidental to the negotiation and carrying of the mortgage loan. Such fees and charges only have to do with transactions prior to and during the life of the loan contract. They are in no manner or way connected with the proper damages and costs which may be recovered by the bank to indemnify it for the expense and cost incident to enforcing its legal remedies after default. The limitations of the law respecting fees and charges are designed to protect the borrowers under the Land Bank System from unjust charges connected with the making and carrying of their loans.

Likewise, the language of Section 791 to the effect that no Federal land bank shall have the power "To demand or receive, under any form or pretense, any commission or charge not specifically authorized in this Act" has to do only with the negotiating and the carrying of the loan itself. Such phrase "commission or charge" as used in this section is further qualified and defined in the language of Section 983 which is the penalty clause in respect to a breach by any bank of receiving any commission or charge not specifically referred to in the Act. This section provides the penalty for any land bank or national farm loan association organized under the Act which shall charge or receive "any fee, commission, bonus, gift, *or other consideration* not herein specifically authorized." (Italics added.)

It was contended by counsel for respondents in his argument before the Supreme Court of Arizona, and the Supreme Court adopted such contention in his opinion, that the words "commission or charge" and the words "fee, commission, bonus, gift, or other consideration" include,

and were intended by Congress to include an attorney's fee in event of foreclosure of a mortgage, and that, therefore, the Federal land bank cannot legally provide in its mortgage forms for an attorney's fee and that if it did so it was subject to the penalties referred to in Section 983.

Such contention entirely overlooks the meaning of the words which are used in these two sections. What is a "commission or charge" as used in section 791 of the Act? A commission or charge anticipates the rendering of some service by one party to another. It is the compensation allowed in recompense for such service. (1 Bouvier's Law Dictionary, p. 548.) These words legally import a consideration allowed as compensation in recompense for services, such as rendered by executors or trustees, factors, agents, etc. However, an attorney's fee when stipulated for in a mortgage is not a "commission or charge". It is not compensation for the rendering of service by the mortgagee to the mortgagor. As heretofore pointed out, the authorities hold that it is an indemnity or damage to which the mortgagee is entitled because of the default of the mortgagor in not complying with the contractual obligation of his contract.

When we come to a consideration of the words which are used in section 983, the penalty section of the Act, we find that "any fee, commission, bonus, gift," is qualified by the significant phrase "*or other consideration*". These words, used in the alternative, are significant and explain the prior words, "any fee, commission, bonus, gift". A "consideration", of course, is a recompense for services rendered, and as used in this section in respect to a Federal land bank can only mean that the land bank cannot receive any "other consideration" than that specifically designated in the Act in rendering service to a borrower. It is apparent, therefore, that the prohibition contained in section 791 and the penalty set out in section 983 refer to the

transactions between the bank and the borrower leading up to the making of the loan, or other service rendered by the bank to the borrower, and not to charges for court costs and attorneys' fees in connection with its remedy of foreclosure.

From the authorities it is apparent that attorneys' fees are regarded as being wholly unrelated to the consideration which is charged by the mortgagee in the form of interest, commissions, bonuses, etc., for making and carrying the mortgage loan. In reality, an attorney's fee is not a fee in the sense which the word is used in section 983. It is an expense necessarily incident to the remedy. The right of a mortgagee to demand indemnity against such expense by a covenant in the mortgage deed, and to enforce such covenant, is a part of the remedy. Under the procedure in most States, such provision is for the reimbursement of the mortgagee for the amount which he has been compelled to incur in fees to his attorney for the enforcement of the remedy; while in a few States the same end is achieved under a different practice by indemnifying the mortgagee against the incurring of an expense for attorney's fees, the expense in such States being met by the mortgagor direct, and the award or judgment running in favor of the attorney.

There is a fundamental rule of construction of a corrective or penal statute such as section 983 of the Act that the evil or wrong legislated against must be kept clearly in view. The evil or wrong which the Congress had in mind when drafting section 983 is not difficult to determine. It is quite universal knowledge that loans through some mortgage companies and lending associations are made upon unreasonable fees and commissions exacted by one or more of the employees of the lending concern which greatly increases the cost to the borrower. It appears from the committee reports and statements of those in

charge of the measure, that at the time of the enactment of the Federal Farm Loan Act, the Congress was fully acquainted with the evils, and not only intended that the interest rate for the borrower from a land bank should be lowered and kept uniform, but also intended to protect him against exorbitant, usurious charges, fees, commissions, etc., directly or indirectly made. (See page 49 of Appendix.) The legislative body had in mind the cost to the borrower in procuring and carrying a loan. The corrective effect and the penalty features are limited to charges made in the closing of the loan and other charges for services rendered by the bank to the borrower and consequently have nothing to do with the remedy in case of default or in the foreclosure of the mortgage.

Can it be conceived that the Congress intended to prohibit Federal land banks from collecting their "damages and costs" in the event of a foreclosure by providing in Section 791 that they should not demand or receive "any commission or charge not specifically authorized"? Obviously, this could not be the case, when the same Congress provided so carefully in Section 971 that the Farm Loan Commissioner should satisfy himself that the laws of each State relating to the foreclosure of mortgages were such "as to assure the holder thereof adequate safeguards against loss in the event of default". It is further provided in Section 676 of the Act; that the banks through their boards of directors should exercise, subject to law, "such incidental powers as shall be necessary to carry on the business herein described"; that they might sue and be sued as natural persons in any court of law or equity; and that, subject to the supervision of the Federal Farm Loan Board, the directors of each bank should prescribe the manner in which its general business should be

conducted "and the privileges granted to it by law exercised and enjoyed".

In view of these provisions, are we to say that the Federal land banks, which were organized for the specific purpose of engaging in the farm mortgage business, may not exercise the privilege enjoyed by natural persons and others engaged in similar enterprises of inserting provisions in their mortgages intended to protect them against loss in the event of default? Yet, if the contention of the respondents be carried to its ultimate conclusion, the banks could not in any foreclosure suit recover any necessary court costs and damages since these costs are not specifically mentioned in the Act.

It is inconceivable that Congress intended to inflict upon the bank the hardship and injustice of suffering a loss on every mortgage it foreclosed for the collection of its debt.

The courts have held universally that when strict construction of the language of a statute will lead to unreasonable, unjust or absurd consequences, it is the duty of the courts to find a reasonable interpretation consistent with the purposes for which the law was enacted.

In 25 R. C. L., under the caption "Statutes", beginning at page 959, it is said:

> "Another occasion for construing a statute is where uncertainty as to its meaning arises not alone from ambiguity of the language employed, but from the fact that giving a literal interpretation to the words will lead to such unreasonable, unjust or absurd consequences as to compel a conviction that they could not have been intended by the legislature." * * *
>
> "252. In General—In construing a statute, the intention of the legislature is to be ascertained not merely from the language of the act taken as a whole, but, where the language is not free from ambiguity, from the application of the act to existing circumstances and necessities. When the words of a statute

are not explicit, the intention of the legislature is to be collected from the context, by considering the subject matter, by looking to the occasion and necessity for the law and the circumstances under which it was enacted, to the mischief to be remedied, the object to be obtained and the remedy in view, by comparing one part with the other and giving effect to the whole, by looking to the old law upon the subject, if any, and to other statutes upon the same or similar subjects, by considering the effects and consequences of a particular construction, and by looking to contemporaneous legislative history and contemporaneous construction of the statute." (Pages 1012-13.) * * *

"256. *Unreasonableness.*—One of the established rules for the construction of statutes is that they should have a rational, sensible construction, if their meaning is at all doubtful. When the language of a statute fairly permits, a construction which will lead to an unreasonable result should be avoided." (Pages 1018-19.) * * *

"258. *Hardship or Injustice.*—It is to be presumed that the legislature did not intend a law to work a hardship or injustice, and it is a reasonable and safe rule of construction to resolve any ambiguity or absurdity in a statute in favor of a just and equitable operation of the law. The terms employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice if another sense, consonant with those principles, can be given to them. It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the latter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice. * * * Where a statute is general in its terms, and not clear and definite in its letter and scope, courts may give it such a construction as will make its operation just and beneficial." (Page 1022.)

In the light of these authorities are we to say that the officers and directors of the Federal Land Bank of Berkeley are to be held criminally responsible, under the provisions of Section 983 of the Act, for a practice which they have followed from the organization of the bank, of recovering court costs and attorneys' fees in order to save it from losses incurred in connection with foreclosure, when the same Act requires those charged with the management of the bank to protect the interests of its shareholders and bondholders? Obviously, items of this character may be recovered by the bank as damages and costs incident to the prosecution of an action for the breach of a contract which it is authorized to make. To state the proposition is to answer it.

4. Under Sections 642 and 781, 971, and 972 of Title 12, U. S. C., this petitioner and the other Federal Land Banks are permitted and authorized to protect themselves against loss in the case of default under any mortgage.

Section 642 of the Act states:

> "'First mortgage' and 'farm loan bonds' defined.—Wherever the term 'first mortgage' is used in this Act it shall be held to include such classes of first liens on farm lands as shall be approved by the Federal Farm Loan Board, and the credit instruments secured thereby."

Over the period of seventeen years the Federal Farm Loan Board has approved and authorized the use by the twelve Federal land banks of mortgage forms containing provisions similar to that of Section 10 of the mortgage contract in this case and providing for the payment of an attorney's fee in the event of foreclosure. The Federal Farm Loan Board has never regarded the costs, expenses and attorneys fee incident to the foreclosure of a mort-

gage as items included within the provisions of Sections 791 and 983 of the Act. The Act requires that the Federal Farm Loan Board shall approve these "credit instruments" or mortgage contract forms used by the land banks.

It is a well-recognized rule of statutory construction that serious consideration must be given by the Court to the interpretation of the executive body charged with its administration. In the case of *Illinois Surety Company* v. *U. S.*, 215 Fed. 334, Judge Knapp of the Circuit Court of Appeals, 4th Circuit, in rendering the opinion of the court, stated (p. 338):

> "It is familiar doctrine that the construction given to a statute by officials charged with its administration will be upheld by the courts unless convincing reason to the contrary is found in the language or purpose of the enactment. *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401, 26 Sup. Ct. 272, 50 Law Ed. 515."

See also *Brewster* v. *Gage*, 280 U. S. 327, 50 Sup. Ct. 115, p. 117; *New York Life Insurance Co.* v. *Burbank* (Iowa), 216 N. W. 742, p. 744.

In Sections 971 and 972 of the Act, as hereinbefore referred to, it is expressly provided that the Farm Loan Commissioner shall make an examination of the laws of every State of the United States relating to the foreclosure of mortgages or other instruments securing loans in order to ascertain whether the laws of any State "*are such as to assure the holder thereof adequate safeguards against loss in the event of default on loans secured by any such mortgages.*" (Italics added.) Furthermore, subdivision "Third" of Section 781 provides that the land bank shall have the power "to empower national farm loan associa-

tions, or duly authorized agents, to collect and immediately pay over to said land banks the dues, interest, amortization installments *and other sums payable under the terms, conditions, and covenants of the mortgages* * * *." (Italics added.)

In granting this power to the land bank it is evident that the Congress intended that a mortgage might include provisions for the payment by the mortgagor of sums other than the dues, interest or amortization installments. Therefore, under the authority contained in Section 781, when, with the approval of the Federal Farm Loan Board, such mortgages include these provisions (that is, for the payment of sums under the mortgage), the bank is empowered to employ agents to collect any such sums that may be due "under the terms, conditions, and covenants of the mortgages." The phraseology of this section alone is sufficient to give a land bank the power and authority to include in its mortgage form a provision providing for the payment of an attorney's fee in the event of foreclosure.

It cannot be argued seriously that Congress did not know when it framed this Federal Farm Loan Act that the usual, if not the almost universal, practice in drawing mortgage agreements was to include therein a provision or stipulation to the effect that the mortgagor should pay an attorney's fee in the event, by his default, the mortgagee was compelled to foreclose the mortgage in order to protect his loan. Congress, being aware of this universal practice in the mortgage field, and of the further fact that it was sanctioned by law and judicial decisions in practically all jurisdictions in the country, would have specifically included in the Act an unmistakable, unequivocal prohibition against the land bank stipulating for an attorney's fee in its mortgages if it intended that the land bank should not avail itself of this safeguard and this right to protect it-

self against an expense thrust upon it by the default of the mortgagor himself.

The intention of Congress was to establish by this Federal Farm Loan Act a sound banking system which would make credit available to farmers at low interest rates on the security of long time mortgages. Absolute safety and low cost of administration were the primary purposes of the Act. (House Document No. 494, 64th Congress, 1st Session.) The contention of the respondents to the effect that the bank cannot stipulate for an attorney's fee in its mortgages, if sound, would eliminate one important factor of safety in connection with the mortgages of a land bank which is a generally accepted and sanctioned safeguard to a mortgagee.

An interesting analogy might be made at this point which will tend to show the absurdity of the contention that the phraseology of Sections 791 and 983 of the Act prohibits the inclusion of an attorney's fee stipulation in the mortgage. There is nothing said in the Act as to whether or not the Bank is entitled to have included in its judgment of foreclosure the actual costs of the foreclosure suit. The respondents in this case did not object or demur to the inclusion in this foreclosure judgment of these costs of suit. The Supreme Court of Arizona and the Lower Court in the State of Arizona allowed and granted these costs. Yet these court costs, like the attorney's fee, are not a "charge specifically authorized in the Act." It would be just as consistent and logical for counsel for the respondents to have objected and for the Court to have refused these costs of suit as to refuse to permit this petitioner to have included in its judgment the attorney's fees stipulated for in the mortgage, inasmuch as "The allowance of ordinary costs of suit to the prevailing party rests upon the same

principle." (*Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642).

A further instance of the effect of this construction of the Act, upon the operations of the land banks, is very forcibly illustrated upon reference to the laws of those States, which authorize the use of "trust deeds" or "deeds of trust" to secure loans in place of mortgages. For example, the statutes of Virginia prescribe the form and terms of deeds of trust to secure debts. In this connection, section 5167 of the Virginia Code of 1930 provides in part:

> "Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely: * * *
>
> "(12) The trustee shall receive and receipt for the proceeds of sale, * * * and apply the same, first, to discharge the expenses of executing the trust, including a commission to the trustee of five per centum of the gross proceeds of sale; * * *."

If the construction placed upon the Farm Loan Act by the Supreme Court of Arizona is correct, it would be impossible for the land banks operating in Virginia to permit their trustees to collect a commission of 5 per cent on the gross amount of the purchase price received at a foreclosure sale. In other words, it would deprive the land banks of one of the adequate "safeguards against loss in the event of default" provided for in the Virginia law.

Furthermore, there is nothing specifically said or provided for in the Act as to the right of the bank to foreclose its mortgages in the event of default. Neither does the Act provide any procedure for the exercise of such

remedy. Can it be said, therefore, that the bank does not have the right to foreclose a mortgage? The right of foreclosure is a right provided for under the terms and provisions of the mortgage itself, not the Act. It would be just as consistent to contend that the bank cannot foreclose a mortgage because the Act does not specifically give it such right as to argue that an attorney's fee is not allowed because the Act does not, in so many words, provide for it.

5. Under Section 676, Fourth, of 12 U. S. C., this petitioner is expressly empowered "to sue and be sued, * * * in any court of law or equity, as fully as natural persons", and is therefore entitled to an award of attorney fees in a foreclose action brought in an Arizona court.

Section 676 of the Act provides that after the organization of a Federal land bank it shall have power—

> "Third. To make contracts.
>
> "Fourth. To sue and be sued, complain, interplead, and defend, in any court of law or equity, *as fully as natural persons.*" (Italics added.)

In view of the foregoing provisions it cannot be said that the Federal land banks, which were organized for the specific purpose of engaging in the farm mortgage business, may not exercise the privilege enjoyed by natural persons and others engaged in similar enterprises of inserting provisions in their mortgages intended to protect them against loss in the event of default. The only restriction in regard to the exercise of this privilege would be the laws of the specific state in which was situated the land in respect to which the mortgage was given. Had the

suit been brought by a natural person, such natural person would have been entitled to an award of an attorney's fee under the laws of the State of Arizona.

VI.

Conclusion.

In conclusion, we wish to call the Court's attention to a statement contained in the report of the Joint Committee on Rural Credits submitting "the draft of a bill [the Farm Loan Act] to provide a system of land-mortgage credits in the United States under Federal supervision." This statement reads as follows:

> "State Legislation.
>
> "It is well understood that the laws in the several States vary as to land titles, registry, exemptions, homestead rights, foreclosure, and equities of redemption. It is therefore made the duty of the farm loan board to investigate these questions in each State and to declare mortgages ineligible as security for farm-loan bonds in those States where the laws do not give adequate protection to those loaning on first mortgage. Very few, if any, States will fall within this rule, and they will doubtless amend their laws promptly in order to bring the benefits of the farm-loan system within reach of their citizens. Section 32." (House Document No. 494, 64th Congress, 1st Session, p. 16.)

The committee recognized that the laws of the several States vary as to "foreclosure and land titles" and that there would not be any conflict between State and Federal statutes with respect to such matters. The recognition of this fact shows conclusively that the Congress intended that the laws of the several States and not of the United States

should be followed and availed of when foreclosure becomes necessary. The governmental body "charged with the execution" of the Act has so construed it. The banks have put this construction into practical operation for a period of more than seventeen years. To hold otherwise would necessitate reading out of the law a number of plain and unambiguous provisions, and would deprive this "system of land mortgage credits" of an important remedy available to, and employed by, "natural persons" engaged in similar enterprises.

In the light of the foregoing, we respectfully submit that the decision of the court below should be reversed.

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APPENDIX.

Senate Calendar No. 135.

1st Session, 64th Congress. Report No. 144.

RURAL CREDITS.

February 15, 1916.—Ordered to be Printed.

[To accompany S. 2986.]

Mr. Hollis, from the Committee on Banking and Currency, submitted the following report:

"The Committee on Banking and Currency, to which was referred the bill (S. 2986) 'To provide capital for agricultural development, to create a standard form of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes,' generally referred to as the 'rural credits bill,' having considered the same, report it back favorably, with amendments, and as amended recommend that the bill do pass."

Modern Farming Requires Capital in Large Amounts—The American Farmer Has the Best Security in the World, Productive Land—This Bill Enables the Farmer to Obtain Capital for Productive Purposes, at Low Rates and for Long Terms, on the Security of His Farm.

Necessity for Farm Capital.

The successful farmer becomes more of a business man each year. He must use more machinery, buy more fertilizer, and sow better seed. He must erect better buildings, raise better stock, and grow better crops. He must store his produce in order to sell in a high market. He must pay cash in order to buy cheap. If he wishes to keep his children on the farm, he must make his home attractive. All of this costs money. He must have ready cash.

Difficulty of Securing Capital.

The farmer applies to the nearest bank for a loan and offers his farm as security. The banker makes excuses. He doesn't know the farmer; he doesn't know the value of his farm; he doesn't like to tie his demand deposits up in long-term loans; his commercial customers, who carry a substantial line of deposits, have the first claim. These excuses are well founded.

There may be additional excuses not so genuine, such as the scarcity of money, the hard hearts of the directors, unusual demands for loans, and the like. If the farmer gets a loan at all, he pays a high rate or he must be subject to foreclosure on short notice. He usually pays some one a large commission; he is subject frequently to substantial renewal fees; he is sometimes compelled to pay taxes on the mortgage as well as on the land; and he finds himself in the power of some hard-headed banker. He can not complain of this; it is the business of the banker to be hard-headed.

Usurious Rates of Interest.

In many parts of the country the farmer is charged extortionate and inexcusable rates of interest, regardless of usury laws and a decent regard for human necessities. He has a real grievance here.

Demand for Reasonable Facilities.

But, in spite of his grievance, the American farmer does not come to Congress with a hard-luck story. He does not ask the Government to bestow on him the public money that all the people have contributed in taxes. He does not demand that the Government become a banker in order to borrow money on bonds and loan the proceeds to him. He merely calls attention to the fact that farming has become a business demanding large amounts of capital; he points out the undoubted excellence of the security he offers; and he demands legislation that shall put it in the power of those who are interested, and those who have money to invest, to extend to him the credit he requires.

He desires the Government to authorize a system of land banks which shall duplicate for him the facilities now commanded by men engaged in manufacturing, in transportation, and in commerce.

Commercial Banks Not Suited to Farmers' Long-term Needs.

The Federal Reserve Act, passed by the last Congress, placed the capstone on a superb structure for commercial credit. It gathers the quick capital of the country into great reservoirs where it is readily available for the needs of trade. Member banks receive the cash deposits of the Nation, and must be prepared at all times to restore them on demand. They must, therefore, invest these deposits in short-time loans so that a steady stream of payments is flowing into the banks, giving them a chance to extend or contract their loans in response to the rise and fall in the supply of deposits. It follows that a commercial bank ought not to make many loans for longer periods than it takes to carry through the ordinary commercial transaction.

An effort was made, however, to extend accommodation to the farmer through the Federal Reserve Act. National banks were encouraged to make personal loans to farmers for periods of six months, and were to a limited extent permitted to loan on improved farm lands for periods not exceeding five years; but your committee is convinced that loans must be made available to farmers on long-term mortgage security through some medium other than the commercial bank.

We have seen that the commercial bank has a valid claim to demand deposits. This leaves for our consideration savings or time deposits and money seeking long-term investment.

Time Deposits Not Available for Long-term Mortgage.

The ordinary time deposit may be withdrawn on 30 or 60 days' notice. It is therefore not properly invested in long-term mortgages. Short-term mortgages or long-term personal credits are more appropriate. Even the mutual savings banks of the East, with their vast resources, will

not place a large percentage of their funds in farm mortgages. They dislike to loan on farm mortgages at all, and when they do make such loans they insist upon a demand note, or a note due in six months at best. It is fair to say, however, that such notes are often allowed to run indefinitely after they are due. But the farmer is in constant dread that he will be compelled to pay at an inconvenient time.

Money Seeking Long-term Investment.

Of money seeking long-term investment at low rates there is an abundant supply. It includes the ordinary savings of the school-teacher, clerk, minister, and wage earner; the proceeds of life insurance in the hands of widows and other beneficiaries; funds belonging to estates, minors, and wards in chancery in the hands of executors, guardians, and trustees; funds of insurance companies, benevolent orders, and societies of various kinds; endowments of colleges, hospitals, museums, and other institutions; and assets to be invested by receivers, courts, and governments. The aggregate of these is enormous. They require an investment that is absolutely safe and reasonably liquid in the sense that it may be converted into cash upon moderate notice; in other words, that it may find a ready market. A safe investment of this character need not carry a high rate of interest.

Investor and Farmer Brought Together for Mutual Profit.

Here we discover the funds that should be made available to the farmer on long-term mortgage. We may picture the owners of this vast wealth grouped on one side of a river, the farmers desiring loans grouped on the other side. It is evident that each has what the other wants. We are asked to furnish the bridge which shall bring them in touch, or rather to grant a franchise to those who will build the bridge if we will construct the approaches. Such we conceive to be a proper function of the Government.

It is clear that the school-teacher in Vermont with $500 to invest can not be sure that the Kansas farm mortgage

offered her is a sound investment. The title of the mortgagor may be defective; the farmer may be improvident; the land may not be productive. She has no way to ascertain these primary facts. But if she is able to buy a long-term bond, with semiannual coupons sure to be promptly paid, secured in common with thousands of like bonds on millions of dollars' worth of farm land, guaranteed by 12 banks with an aggregate capital of not less than six millions, with selected borrowers of known character, with titles examined and all details attended to by trained men, and with Government examination and supervision, she may invest with confidence on a moderate-income basis.

A bond of this character would be safer than a savings bank deposit, and it would bring a higher return than savings banks average. It has been the aim of your committee to devise a system of land banks which shall bring the investor and the farmer together for mutual profit at a moderate cost through the medium of such a bond.

Primary Considerations.

The primary considerations in devising such a system are—

1. Absolute safety and attractive income to the investor.
2. Low interest rates, long-term mortgages, and amortization payments for the farmer.
3. Low cost of administration.
4. Simplicity of organization and operation.
5. Adaptability to every part of the country.
6. Stimulation to the cooperative spirit.

These details will be discussed after a general description of the plan.

General Plan.

Government control of the system is assured by the creation of a nonpartisan Federal farm-loan board, consisting of the Secretary of the Treasury and four members appointed by the President for terms of eight years each and paid from the Public Treasury. (Section 3.)

Twelve Land Banks.

Loans are made to farmers by 12 or more Federal land banks, each operating in a separate district and having a capital of not less than $500,000. If the full amount is not subscribed from private sources, the Government subscribes for as much as may be necessary to make up the required amount. Provision is made for returning the Government subscription after the land banks are firmly established. (Sections 4 and 5.)

Local Associations.

In order to secure intimate touch with the borrowers, it is provided that the land bank shall make loans to farmers through local associations of borrowers, called national farm loan associations. These associations do not conduct a banking business. Their operations are very simple. They admit members who desire to borrow; their directors and loan committees pass on the value of the security and the character of the borrower. Every borrower takes stock in the farm loan association to the amount of 5 per cent of the face of his loan. This amount is subscribed by the association to the stock of the land bank, thus providing for a capital proportionate to the amount of loans, approximately 1 to 20. (Sections 7 and 8.)

Limited or Unlimited Liability.

The farm loan associations may be of limited liability or of unlimited liability. In the former each member is liable for the debts of the association in an amount equal to the face of his subscribed stock; in the latter the member undertakes unlimited liability for all the debts of the association. This individual liability gives to the indorsement of the association solid financial backing. The bill provides that all loans shall be indorsed by the association of which the borrower is a member. (Sections 9 to 12.)

We thus have a mortgage loan, secured by productive farm land, indorsed by a farm loan association. The loan indorsed by a farm loan association with unlimited liability on the part of its members will naturally have a better

standing than loans indorsed by an association in which the liability is limited. Each land bank will keep the two classes of mortgages separate. (Section 16.)

Farm Loan Bonds Secured by Mortgages.

When the land bank has a substantial amount of either kind of mortgages on hand, not less than $50,000, it may issue a like amount of farm loan bonds based on the mortgages as collateral security. Every farm loan bond limited is secured by all the farm mortgages held by the land bank on which there is limited liability of the local members; every farm loan bond unlimited is secured by all the mortgages held by the land bank on which there is unlimited liability of the local members. Because of the unlimited liability, the latter bonds should be sold on a more favorable basis than the former. (Sections 16, 21-25.)

Every Federal land bank guarantees the payment of every bond and coupon issued by every other Federal land bank. This gives them a broad insurance. Section 24.

Expenses and Profits.

The land banks are permitted to charge borrowers 1 per cent more for interest than they pay bondholders. For example, if the current rate on farm-loan bonds is 4 per cent, the bank may charge not to exceed 5 per cent to farmers who borrow. This margin of 1 per cent on the amount of unpaid principal outstanding is available to the bank for its expenses and earnings, but it will probably be largely reduced in practice. The profits go to the local associations in the form of dividends on stock of the land bank held by the associations and reach the borrowers in the form of dividends on stock held by them in the associations. In this way the earnings of the system go to the borrowers, and its cooperative character is assured. If the 1 per cent margin is too high, no harm is done, for the excess comes back to the borrower in dividends. Section 13.

Such is the general plan of the system which we recommend.

Coming now to the details of the bill, we shall first speak of the farm-loan bonds as an attractive investment.

Strength of the Bonds.

It is obvious that the first requisite of a long-term bond, bearing a low rate of interest, is its security. Every reasonable safeguard is provided in the bill.

Restrictions on Mortgages.

The mortgages which stand as security back of the bonds are carefully restricted.

No bank may loan on land outside its district.

Every mortgage deposited as security is on the amortization plan, so that part of the principal is paid up every six months.

The money must be borrowed for productive purposes, for the purchase of a farm for a home, or to liquidate existing indebtedness.

No loan shall exceed 50 per cent of the appraised value of the mortgaged land.

The borrower must engage in the cultivation of the farm mortgaged.

The maximum of loans to one borrower is limited to $10,000.

The purpose for which the loan is obtained must be stated.

The loan becomes due and payable upon breach of any condition of the mortgage. Section 12.

Appraisal.

Every application for a loan must be passed upon by the loan committee of the local association, who shall make a detailed written report, signed by all three members, giving the appraisal of the land as determined by them. The directors and the loan committee must approve the loan, the latter unanimously, before it is recommended to the land bank. The application and the report of the loan committee go to the land bank.

The land bank must refer the application and the report of the loan committee to one or more of the land-bank appraisers for the district. These appraisers are public officials appointed by the Federal Farm Loan Board.

(Sec. 3.) They have no inducement to make an excessive appraisal. It is their duty to make a careful and impartial written report, and no loan may be made unless their report is favorable. The directors of the land bank must then decide whether or not to make the loan.

Every application thus runs the gauntlet of the local loan committee, the local board of directors, the land-bank appraisers, and the land-bank directors.

Whenever mortgages are put up as security for the issue of farm-loan bonds, they are referred by the farm loan board to special appraisers for further appraisal and examination. Section 19.

Security of Bonds.

Every farm loan bond is secured as follows:

1. By the capital, reserves, and earnings of the land bank which issues it.

2. By the capital, reserves, and earnings of the 11 other land banks.

3. By the collective security of all the mortgages in its division (limited or unlimited) of the land bank, the mortgages pledged being at least equal in amount to the outstanding bonds.

Every mortgage pledged as collateral is secured as follows:

1. By the personal undertaking of the borrower.

2. By the security of the mortgaged land, at least double in value to the amount of the loan.

3. By the capital, reserves, and earnings of the local association indorsing the loan.

4. By the individual liability of the members of the indorsing association.

Attractiveness of the Bonds as an Investment.

A bond of the undoubted security possessed by the farm loan bonds above described should prove a most attractive investment. Since all the bonds are guaranteed by all the

land banks they should sell on practically the same basis throughout the country. And it is not too much to expect them to sell on a 4 per cent basis. In such case the farmer would get his loans at 5 per cent.

An absolutely safe investment, with interest payable semiannually, on a 4 per cent basis should be able to compete with other long-term investments or savings banks on its merits.

Tax Exemption.

It is proposed, however, to make these bonds and the income derived therefrom exempt from all Federal, State, and local taxation. This exemption should place them ahead of any bonds bearing the same rate and not enjoying a similar exemption. (Section 29.)

Investment in Farm Loan Bonds.

Farm loan bonds are also made a lawful investment for all fiduciary and trust funds and may be accepted as security for all public deposits. They may also be purchased by banks of the Federal Reserve System. (Section 30.)

Interest Rates to Farmers.

Present interest rates to farmers are so confused with commissions, fees, and charges of various sorts that it is difficult to ascertain the total cost of money on farm mortgages. Dr. C. W. Thompson, specialist in charge of rural organization in the Department of Agriculture, reports that the average rate varies from 5.3 per cent in New Hampshire to 9 per cent and even 10 per cent in certain Southern and Western States, including commissions. We herewith print the table furnished by Dr. Thompson:

Farm mortgage loans—average rates for interest and commission.

Geographic division and State.	Average interest rate.	Average annual commission.[1]	Interest plus commission.	Geographic division and State.	Average interest rate.	Average annual commission.[1]	Interest plus commission.
New England:				South Atlantic—Contd.			
Maine	6.1	0.1	6.2	West Virginia	6.2	0.2	6.4
New Hampshire	5.3	(2)	5.3	North Carolina	6.3	1.4	7.7
Vermont	5.6	(2)	5.6	South Carolina	7.8	.6	8.4
Massachusetts	5.6	(2)	5.6	Georgia	7.6	1.1	8.7
Rhode Island	5.7	.2	5.9	Florida	9.0	.6	9.6
Connecticut	5.7	(2)	5.7	East South Central:			
Middle Atlantic				Kentucky	6.7	.4	7.1
New York	5.5	.1	5.6	Tennessee	7.3	.6	7.9
New Jersey	5.5	.3	5.8	Alabama	8.7	.7	9.4
Pennsylvania	5.5	.3	5.8	Mississippi	8.0	.5	8.5
East North Central:				West South Central:			
Ohio	5.9	.2	6.1	Arkansas	9.0	.6	9.6
Indiana	5.8	.4	6.2	Louisiana	8.2	.4	8.6
Illinois	5.7	.3	6.0	Oklahoma	6.6	1.8	8.4
Michigan	6.3	.3	6.6	Texas	8.4	.6	9.0
Wisconsin	5.7	.1	5.8	Mountain:			
West North Central:				Montana	8.4	1.6	10.0
Minnesota	6.3	.5	6.8	Idaho	8.2	.7	8.9
Iowa	5.6	.3	5.9	Wyoming	9.2	.8	10.0
Missouri	6.2	.6	6.8	Colorado	8.3	.6	8.9
North Dakota	6.9	1.8	8.7	New Mexico	9.7	.8	10.5
South Dakota	7.0	1.0	8.0	Arizona	9.1	.3	9.4
Nebraska	6.3	.8	7.1	Utah	8.6	.4	9.0
Kansas	6.1	.8	6.9	Pacific:			
South Atlantic:				Washington	7.9	.8	8.7
Delaware	5.6	(2)	5.6	Oregon	7.7	.3	8.0
Maryland	5.7	.4	6.1	California	7.4	.2	7.6
Virginia	6.1	.7	6.8				

[1] Where the report shows a commission paid once for all in advance on a loan running more than one year, the equivalent annual commission is used.

[2] Less than one-tenth of 1 per cent.

As the foregoing table gives the average rate, there must be individual cases running much higher. Testimony before the joint subcommittees of the Senate and House Committees on Banking and Currency in 1914 gave the maximum rate as high as 25 per cent, including commissions and charges.

It is readily seen that a rate as low as 5 per cent, 5½ per cent, or even 6 per cent, would be of great benefit to farmers in most sections of the United States.

Long-term Mortgages.

Where money is borrowed by farmers to invest as fixed capital in the purchase of a home, in the erection of farm buildings, in the construction of roads, drains, and fences, in the purchase of machinery and stock, or for like purposes, the loan should be paid out over a long period, varying somewhat with the permanence of the investment. At

present it is difficult for a farmer to borrow money for a longer period than five years, and with renewals come additional commissions, fees, and charges. Even where it is the policy of banks to allow a loan to run for a long period without demanding payment, they insist upon a demand obligation so that their funds will not be tied up in case of sudden calls for deposits. This arrangement leaves the farmer in a continual state of uncertainty, as he may be called on to pay in times of financial stress when it may be impossible to obtain funds.

The bill provides, therefore, that loans may be made for long terms, not to exceed 36 years. It is believed that a longer period would not be advisable for the United States, although farm mortgages are made in Europe for periods as long as 75 years.

The reason for fixing upon a maximum period of 36 years is explained in the following paragraph.

Amortization Payments.

Ultimate payment of the mortgage debt is as important to the farmer as a low rate of interest. Experience teaches that a borrower is most likely to pay out his loan if he pays in small regular installments at fixed periods.

For example, if the farmer pays 5 per cent interest on his loan, payable semiannually, and with each interest payment pays 1 per cent on the principal of his loan, his debt will be entirely paid off in 36 years. If he pays a larger percentage of his loan with each payment, liquidation of the principal will be correspondingly quicker.

The approved practice is to spread the entire payment over the term of the loan in fixed equal semiannual payments. When the rate of interest is fixed and the borrower decides what percentage of the loan he will undertake to pay off each year the semiannual payments are readily figured. All students of rural credits recommend this feature.

Low Cost of Administration.

We have already seen that every reasonable effort must be made to make the farm-loan bonds attractive to the

investor at low rates and that safety is the prime requisite. It is clear, moreover, that the cost of proper safeguards, such as appraisals, examining titles, and the ordinary overhead charges of a banking business, must be met by the borrower in the form of increased interest charges.

Broadly speaking, large expenditures to insure absolute safety will be reflected in the favorable rates on farm-loan bonds. But there is a point at which expenditure would be out of proportion to the results obtained. In the solution of this problem the committee has been guided by sound banking principles and the experience of similar systems in Europe.

Assistance from Borrowers.

Everyone must concede the importance of strong land banks, managed by trained bankers, for the purpose of making sound loans and issuing sound bonds. Salaries and expenses comparable to those of a joint-stock bank must be expected in the performance of these essential functions. But the special capabilities of the land-bank managers must be supplemented by an intimate knowledge of the borrower and his affairs, particularly of the farm land he offers as security. This supplementary knowledge is furnished without additional cost through the local associations.

At the outset we secure the personal interest of the borrower by requiring him to contribute to the capital of the loan association 5 per cent of the face of his loan. This personal stake makes the system mutual and makes the borrower a cooperator. His interest is further secured by his personal liability as a stockholder (double or unlimited, as the case may be). He knows that if the association recommends and indorses a bad loan, he may be called on to help make the loan good.

We should thus expect every member to keep careful watch lest his loan association make unsafe loans, with resulting personal loss to him. We should also expect him to see that the best available men in the community act as directors and as members of the loan committee.

As it is the essence of cooperation that the members shall contribute their services, we shall get all this local care, supervision, and personal interest without the payment of fees or salaries. The only salaried official of loan associations will be the secretary-treasurer, and as all the banking business and most of the bookkeeping will be done by the land bank, and as there will be no local office to be kept open for daily business, his remuneration should be small. We believe the cost of administration will be as low as safety permits.

Simplicity of Organization and Operation

The purpose is to make the system as simple as is consistent with efficiency and security.

A central board to represent the public seems essential.

Land banks to do the technical banking business can not be dispensed with. This business must be done by some one and paid for. It is not the sort of work that members can contribute gratuitously.

The necessary intimate contact with the farmer is done effectively, directly, and cheaply through local cooperative associations.

Farmers of a given locality apply to the land bank of their district for a charter. The land bank supplies circulars, blanks, and all necessary information. After the charter is granted the land bank makes the loans, and the payments are forwarded to it by the local associations. The land banks issue the bonds and get fresh supplies of money to loan to new borrowers.

It is plain that the land banks do the real business of the system. They make the loans and they issue the bonds. But they are under the supervision of the Farm Loan Board, and they command the help of the local associations. The system is simplicity itself.

Adaptability to Every Part of the Country.

A study of the various European systems discloses three main types of land mortgage banks:

1. Cooperative banks, with unlimited liability.

2. Cooperative banks, with limited liability.
3. Joint-stock banks.

Cooperative Associations.

The reported bill permits farmers to organize local associations with double liability, or with unlimited liability. If they will organize mainly on the unlimited plan they will get lower rates of interest; for mortgages carrying unlimited liability of the borrowers for all debts of the association make the safest basis for farm-loan bonds, and hence would insure fresh supplies of capital at the lowest rates.

Your committee has felt it wise to make either form of cooperative association available for the use of farmers, so that they may make their choice. It is quite possible that an association with limited liability may exist in the same community with an unlimited association.

It has not been difficult to devise a plan under which both classes of cooperative associations may be organized and obtain accommodation for their members through the same land banks, with a segregation of assets, expenses, and earnings. Experience alone will demonstrate which type will be most availed of. One type may appeal more strongly to the farmers of one district, with the contrary result in another district.

Joint-stock Banks.

In some localities where land values are settled and farmers are accustomed to borrow from mortgage banks it is quite possible that farmers will prefer to obtain mortgage loans from a joint-stock bank operating under a Federal charter, with Federal restrictions and supervision.

Some farmers, moreover, may object to the association with their neighbors in cooperative undertakings; they may not like the publicity and scrutiny that cooperation entails; they may not be able or willing to subscribe 5 per cent of the face of the desired loan to the stock of the local association. Moreover, associations may start slowly in some States, leaving a wide field unoccupied for years.

Provision is therefore made (section 18) for the organization of joint-stock land banks of not less than $250,000

capital, to be privately subscribed. Their operations will be confined to a single State and adjoining States, and they will be permitted to make loans and to issue farm loan bonds under the supervision of the farm loan board. Their stockholders will assume double liability. Their capital will be readily available from the outset, and they will thus have certain advantages over cooperative banks in getting their money out on loans. In order, therefore, to equalize to some extent the earning power of the two classes of banks, they are limited in the issue of bonds to fifteen times their capital and surplus. The cooperative banks may issue bonds to the amount of twenty times their capital and surplus.

Joint-stock land banks are not permitted to engage in any business but making farm mortgage loans and issuing bonds. In States with populations exceeding two millions of people, their capital stock must be not less than $500,000. Their bonds are called joint-stock bonds, and must be in such form as to be readily distinguished from bonds issued by Federal (cooperative) land banks. They are given a free hand as to interest rates on loans and bonds, except that the margin for expense and profit must not exceed 1 per cent a year on the principal of outstanding loans. (Section 18.)

Provision is thus made for the existence of the three types of mortgage banks. They will be competitors in granting loans and in selling bonds, but they will all be under strict Government supervision. Each type, in order to survive, must prove its usefulness. Your committee feels that there is a field for all three.

Land Bank Agents.

It is desired that local associations organize in every community at an early date, but it is also recognized that on account of peculiar local conditions some communities may be without local associations or joint-stock land banks indefinitely. The farm loan board is given power in such cases to authorize Federal land banks to make loans to farmers through duly incorporated banks, trust companies, and mortgage institutions.

Such loans would be subject to the conditions of loans made through farm-loan associations, and the borrower would be required to contribute 5 per cent of the face of his loan to the capital of the land bank. The agent would indorse the loan and become responsible for its payment and the collection of interest and amortization installments, receiving such compensation as might be agreed, not to exceed one-half of 1 per cent of the total unpaid amount of the loan. (Section 17.)

In this way it is hoped to take advantage of existing institutions in districts which are not otherwise adequately served. It is feared that the formation of cooperative associations would be retarded if the privilege of making loans through agents should be granted too freely. Hence the restriction expressed at the beginning of section 17.

Government Depositaries.

The land banks are authorized to act as Government depositaries and are required to act as financial agents of the Government. They thus become instrumentalities of the Federal Government. (Section 6.)

Reserves and Dividends.

Farm-loan associations and land banks are required to carry semiannually to reserve account 25 per cent of their net earnings until the reserves equal 20 per cent of the outstanding capital and to maintain the reserves at 20 per cent. After the reserves equal the required percentage of the capital stock 5 per cent of the net earnings must be carried to reserve annually. After the reserve requirements are met the balance of net earnings is available for dividends. Sections 26 and 27.

State Legislation.

It is well understood that the laws in the several States vary as to land titles, registry, exemptions, homestead rights, foreclosure, and equities of redemption. It is therefore made the duty of the farm loan board to investigate these questions in each State and to declare mortgages

ineligible as security for farm-loan bonds in those States where the laws do not give adequate protection to those loaning on first mortgage. Very few, if any, States will fall within this rule, and they will doubtless amend their laws promptly in order to bring the benefits of the farm-loan system within reach of their citizens. (Section 31.)

Other Provisions.

There are other important provisions of the proposed bill which need no discussion here, notably those concerning defaulted loans (section 28), examinations (section 32), penalties for accepting gifts, bonuses, or commissions, for giving false information, for embezzlement, for counterfeiting, etc. (section 33), dissolution of loan associations and land banks (section 35), and appointment of receivers (section 35).

Stimulating the Cooperative Spirit.

The rapid increase of tenant farmers and the tendency to abandon agriculture and seek the larger centers of population has become a national menace in this country, as well as in Europe. It increases the cost of living and causes a one-sided development. Most civilized nations are already offering direct aid and other inducements to persuade the people back to the land. We believe that the United States can well afford the moderate encouragement provided in this bill.

Much has been accomplished in Europe by legislation that encourages cooperation. There are societies to organize cooperative institutions, lecturers who go about to spread the cooperative gospel, and training schools for boys, girls, and adults. There are laws establishing systems of personal rural credits, as well as land-mortgage systems. There are cooperative buying, cooperative selling, cooperative creameries, markets, breeding establishments, insurance companies, and the like. These are all important, especially personal credits.

Our country lags far behind Europe in most matters of cooperation among farmers. There are conditions which render it more difficult here than in older countries. But

so far as cooperation is applicable, and as speedily as we can adapt it to our own conditions, it should be established.

The framers of this bill realize that it is but one factor in the vast field for national cooperation that lies before the American farmer. But they entertain the hope that organization for the purpose of securing land mortgage credit will bring neighboring farmers into closer touch all over the Union and will stimulate the cooperative spirit. Those men who organize farm loan associations will become better acquainted and more trustful of each other, so that it will be comparatively easy to form organizations among the land mortgage groups for personal-credit unions and various forms of cooperative activity.

In this connection we desire to acknowledge the debt we owe to those pioneers who have awakened the interest of the American people in rural credits. Largely through the efforts of Senator Fletcher of Florida, the American Commission and the United States Commission went to Europe in 1913 and gathered the information and evidence contained in Senate Document No. 214, Sixty-third Congress, first session, entitled "Agricultural Cooperation and Rural Credit in Europe."

Summary.

It is believed that the system of land banks outlined in the proposed bill affords a safe and attractive farm loan bond for the investing public; low interest rates, long-term mortgages, and easy payments for the farmer; low cost of administration; simplicity of organization and operation; adaptability to the needs of every section; and stimulation to the spirit of generous cooperation among farmers.

THE FEDERAL FARM LOAN ACT.

AS AMENDED TO JULY 16, 1932, EXCLUSIVE OF PROVISIONS RELATING TO FEDERAL INTERMEDIATE CREDIT BANKS.

An act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes. (July 17, 1916, c. 245, 39 Stat. 360.)

§ 641. *"Federal Farm Loan Act"; administration by Federal Farm Loan Board.*—The Act of July 17, 1916 (c. 245, § 1, 39 Stat. 360), as amended by Act of March 4, 1923 (c. 252, Title I, § 1, 42 Stat. 1454), to include Federal intermediate credit banks may be cited as the "Federal Farm Loan Act." Its administration shall be under the direction and control of the Federal Farm Loan Board hereinafter created. (July 17, 1916, c. 245, § 1, 39 Stat. 360; Mar. 4, 1923, c. 252, Title I, § 1, 42 Stat. 1454.)

§ 642. *"First mortgage" and "farm loan bonds" defined.*—Wherever the term "first mortgage" is used in this Act it shall be held to include such classes of first liens on farm lands as shall be approved by the Federal Farm Loan Board, and the credit instruments secured thereby.

§ 651. *Federal Farm Loan Bureau; creation; supervision by board.*—There shall be established at the seat of government in the Department of the Treasury a bureau charged with the execution of this Act and of all Acts amendatory thereof, to be known as the Federal Farm Loan Bureau, under the general supervision of a Federal Farm Loan Board. (July 17, 1916, c. 245, § 3, 39 Stat. 360.)

§ 659. *Attorneys, experts, and other employees; employment; salaries and fees.*—The Federal Farm Loan Board shall be authorized and empowered to employ such attorneys, experts, assistants, clerks, laborers, and other em-

ployees as it may deem necessary to conduct the business of said board. All salaries and fees authorized in 12 U. S. C. 652, 653, and 655 to 659 [F. F. L. Act § 3] and not otherwise provided for shall be fixed in advance by said board and shall be paid in the same manner as the salaries of the Federal Farm Loan Board. All such attorneys, experts, assistants, clerks, laborers, and other employees, and all registrars, examiners, and appraisers shall be appointed without regard to the provisions of 5 U. S. C. 632, 635, 637, 638, and 640 to 642, Executive Departments and Government Employees [Jan. 16, 1883, 22 Stat. 403], and amendments thereto, or any rule or regulation made in pursuance thereof and may be classified without regard to 5 U. S. C., c. 13, Executive Departments and Government Employees [Classification Act of 1923]: *Provided*, That nothing herein shall prevent the President from placing said employees in the classified service. (July 17, 1916, c. 245, § 3, 39 Stat. 361; Mar. 4, 1925, c. 524, § 4, 43 Stat. 1263.)

§ 676. *Time of commencement of corporate existence of land banks; powers enumerated.*—Upon duly making and filing such organization certificate the bank shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. To adopt and use a corporate seal.

Second. To have succession until it is dissolved by Act of Congress or under the provisions of this Act.

Third. To make contracts.

Fourth. To sue and be sued, complain, interplead, and defend, in any court of law or equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to elect a president and a vice president, appoint a secretary and a treasurer and other officers and employees, define their duties, require bonds of them, and fix the penalty thereof; by action of its board of directors dismiss such officers and employees, or any of them, at pleasure and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, subject to the supervision and regulation of the Federal Farm Loan Board, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected, its officers elected or appointed, its property transferred, its general business conducted and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business herein described. (July 17, 1916, c. 245, § 4, 39 Stat. 363.)

§ 771. Second. *Agreement for repayment on amortization plan.*—Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan by means of a fixed number of annual or semiannual instalments sufficient to cover, first, a charge on the loan at a rate not exceeding the interest rate in the last series of farm loan bonds issued by the land bank making the loan; second, a charge for administration and profits at a rate not exceeding 1 per centum per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage.

§ 781. *Enumerated powers.*—Every Federal land bank shall have power, subject to the limitations and requirements of this Act—

Second. *Investing funds in farm first mortgages.*—To invest such funds as may be in its possession in the purchase of qualified first mortgages on farm lands situated within the Federal land bank district within which it is organized or for which it is acting. (July 17, 1916, c. 245, § 13, 39 Stat. 372.)

Third. *Receipt and deposit of mortgages as collateral for bonds; collection of moneys payable under mortgages and bonds.*—To receive and to deposit in trust with the farm loan registrar for the district, to be by him held as collateral security for farm loan bonds, first mortgages upon farm land qualified under 12 U. S. C. 771 [F. F. L. Act § 12], and to empower national farm loan associations, or duly authorized agents, to collect and immediately pay

over to said land banks the dues, interest, amortization installments and other sums payable under the terms, conditions, and covenants of the mortgages and of the bonds secured thereby. (July 17, 1916, c. 245, § 13, 39 Stat. 372.)

Ninth. *Charging fees for loans.*—To charge applicants for loans and borrowers, under rules and regulations promulgated by the Federal Farm Loan Board, reasonable fees not exceeding the actual cost of appraisal and determination of title. Legal fees and recording charges imposed by law in the State where the land to be mortgaged is located may also be included in the preliminary costs of negotiating mortgage loans. The borrower may pay such fees and charges or he may arrange with the Federal land bank making the loan to advance the same, in which case said expenses shall be made a part of the face of the loan and paid off in amortization payments. Such addition to the loan shall not be permitted to increase said loan above the limitations provided in 12 U. S. C. 771 [F. F. L. Act § 12]. (July 17, 1916, c. 245, § 13, 39 Stat. 372.)

§ 791. *Enumeration of restrictions.*—No Federal land bank shall have power—

Fifth. *Demanding unauthorized commissions.*—To demand or receive, under any form or pretense, any commission or charge not specifically authorized in this Act (July 17, 1916, c. 245, § 14, 39 Stat. 372.)

STATE LEGISLATION IMPAIRING SECURITY OF FARM LOANS.

§ 971. *Examination of State laws as to conveying and recordation.*—It shall be the duty of the Farm Loan Commissioner to make examination of the laws of every State of the United States and to inform the Federal Farm Loan Board as rapidly as may be whether in his judgment the laws of each State relating to the conveying and recording of land titles, and the foreclosure of mortgages or other instruments securing loans, as well as providing homestead and other exemptions and granting the power to waive such exemptions as respects first mortgages, are such as to

assure the holder thereof adequate safeguards against loss in the event of default on loans secured by any such mortgages. (July 17, 1916, c. 245, § 30, 39 Stat. 382.)

§ 972. *First mortgages as basis of issue of bonds; assistance in examinations.*—Pending the making of such examination in the case of any State, the Federal Farm Loan Board may declare first mortgages on farm lands situated within such State ineligible as the basis for an issue of farm loan bonds; and if said examination shall show that the laws of any such State afford insufficient protection to the holder of first mortgages of the kinds provided in this Act, said Federal Farm Loan Board may declare said first mortgages on land situated in such State ineligible during the continuance of the laws in question. In making his examination of the laws of the several States and forming his conclusions thereon said Farm Loan Commissioner may call upon the office of the Attorney General of the United States for any needed legal advice or assistance, or may employ special counsel in any State where he considers such action necessary. (July 17, 1916, c. 245, § 30, 39 Stat. 382.)

§ 973. *Statement by Loan Board; noncompliance of State laws with requirements of board.*—At the request of the Executive of any State the Federal Farm Loan Board shall prepare a statement setting forth in what respects the requirements of said board can not be complied with under the existing laws of such State. (July 17, 1916, c. 245, § 30, 39 Stat. 382.)

§ 983. *Charging or receiving unauthorized fee or commission; disclosing names of borrowers.*—No land bank or national farm loan association organized under this Act shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized. No examiner, public or private, shall disclose the names of borrowers to other than the proper officers of a national farm loan association or land bank without first having obtained express permission in writing from the Farm Loan Commissioner or from the board of directors of such association

or bank, except when ordered to do so by a court of competent jurisdiction or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress or of either House duly authorized. Any person violating any provision of this paragraph shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or both. (July 17, 1916, c. 245, § 31, 39 Stat. 382.)

(4359).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 498

THE FEDERAL LAND BANK OF BERKELEY, A CORPORATION, PETITIONER,

vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ AND BRIEF.

IRVING P. WHITEHEAD,
As Amicus Curiæ, Counsel for
The Federal Land Bank of Springfield, Springfield, Mass.
The Federal Land Bank of Baltimore, Baltimore, Md.
The Federal Land Bank of Columbia, Columbia, S. C.
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The Federal Land Bank of New Orleans, New Orleans, La.
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The Federal Land Bank of St. Paul, St. Paul, Minn.
The Federal Land Bank of Omaha, Omaha, Nebr.
The Federal Land Bank of Wichita, Wichita, Kans.
The Federal Land Bank of Houston, Houston, Texas.
The Federal Land Bank of Spokane, Spokane, Wash.

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vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the eleven Federal land banks named below, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiæ*.

IRVING P. WHITEHEAD,
As Amicus Curiæ, Counsel for
The Federal Land Bank of Springfield, Springfield, Mass.
The Federal Land Bank of Baltimore, Baltimore, Md.
The Federal Land Bank of Columbia, Columbia, S. C.
The Federal Land Bank of Louisville, Louisville, Ky.
The Federal Land Bank of New Orleans, New Orleans, La.
The Federal Land Bank of St. Louis, St. Louis, Mo.
The Federal Land Bank of St. Paul, St. Paul, Minn.
The Federal Land Bank of Omaha, Omaha, Nebr.
The Federal Land Bank of Wichita, Wichita, Kans.
The Federal Land Bank of Houston, Houston, Texas.
The Federal Land Bank of Spokane, Spokane, Wash.

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THE FEDERAL LAND BANK OF BERKELEY, A CORPORATION, PETITIONER,

vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

BRIEF OF IRVING P. WHITEHEAD, AS AMICUS CURIÆ.

I. Preliminary Statement.

Leave to file this brief as *amicus curiæ* has been requested by the undersigned for and on behalf of the eleven Federal land banks named in the accompanying motion.

Each of the Federal land banks, on whose behalf this brief is filed, are bodies corporate organized, chartered and existing under and by virtue of an Act of Congress, approved July 17, 1916, and Acts amendatory thereof, all of which are known and cited as the Federal Farm Loan Act (12 U. S. C., Chap. 7). Each bank is authorized and empowered to engage in the business of lending money to farmers on the security of qualified first mortgages on

farm lands situated within the Federal land bank district within which it is organized, or for which it is acting, and in the business of selling standard forms of securities based upon such qualified first mortgages. The banks on whose behalf this brief is filed, together with the Federal Land Bank of Berkeley, constitute a cooperative system of land banks, which conduct and carry on their operations subject to the same conditions and limitations as are set forth in their respective charters, and as prescribed by the Federal Farm Loan Act.

The question involved in the case now before this Court is one regarding the proper construction and practical application of certain provisions of the Act. These provisions have never been construed or passed upon by this Court.

The statutory provisions in question, and the principles of law which are involved in the assignment of error, are applicable to similar contracts, similar relationships, and to the practice followed by all of the banks of the system with respect to similar transactions throughout the entire United States, and the provisions in question have received a uniform interpretation by the banks and by the governmental body charged with the duty of supervising their activities and the execution of these and other provisions of the statute under which they operate.

The decision of this Court, with respect to the question presented to it in this case, is of fundamental importance to the whole Federal land bank system.

In the discussion of this and other important questions in this brief, it will be impossible to avoid a duplication, to some extent, of the arguments contained in the petitioner's brief. With those arguments this *amicus* is in complete accord, and the omission of some of them herein is by no means to be construed as a refutation of their co-

gency or correctness. This *amicus* believes, however, that it will be helpful to call the Court's attention to certain provisions of the Act, and to certain principles of law, which were not discussed in detail in the brief filed on behalf of the petitioner.

II. Statement of the Case.

This *amicus* concurs in the statements regarding the jurisdiction of this Court and the proceedings below, as set forth in the brief filed on behalf of the Federal Land Bank of Berkeley. It is therefore prayed that the contents of petitioner's brief, with respect to these matters, be read as if stated by this *amicus* on behalf of the eleven banks for which he speaks.

As previously stated, the petitioner is one of the twelve Federal land banks chartered under the provisions of the Federal Farm Loan Act, and is authorized to operate and conduct its business in the eleventh Federal land bank district, comprising the States of Arizona, California, Nevada and Utah.

A number of years after the bank was organized, Samuel S. Warner filed his application for membership in the Salt River Valley National Farm Loan Association, and was duly elected a member thereof. At the same time, he filed a written application for a loan from the Federal Land Bank of Berkeley in strict conformity with the provisions of the Act. Later his application was approved, and on November 1, 1922, the respondent and Lydia S. Warner, his wife, executed and delivered to the bank their promissory note in the principal sum of $7,200, together with a first mortgage covering certain farm lands situate in Maricopa County, Arizona, securing the payment of said note. This mortgage was made and executed pursuant to, and in accordance with, the provisions of the Federal Farm Loan

Act and was in form and term approved by the Federal Farm Loan Board.* Among others, this mortgage contained the following provision:

> "This mortgage and the note secured thereby are executed and delivered under and in accordance with the said Federal Farm Loan Act, and are subject to all the terms, conditions and provisions thereof, which Act is made a part hereof the same as if set out in full herein."

The record in the Court below (R. 29) shows that pursuant to, and in accordance with, these "terms, conditions and provisions," the Federal Farm Loan Board had approved the inclusion of a further agreement in said mortgage under which the Respondent Warner was required to pay, and the Federal Land Bank of Berkeley was authorized to collect all costs, legal expenses, and reasonable attorney's fees, incident to the institution of any proceedings to foreclose the mortgage. This provision read as follows:

> "(10) That in case of institution of suit to foreclose this mortgage, the mortgagors shall pay, as a part of

---

*"The Farm Loan Board consisted of the Secretary of the Treasury and six members, to be appointed by the President, Section 3; 12 U. S. C., Section 652. After the entry of the final judgment in this cause, the Federal Farm Loan Board was abolished and its functions were transferred to the Farm Loan Commissioner, subject to the jurisdiction and control of the Farm Credit Administration, by Executive Order of the President, No. 6084 of March 27, 1933; the name of the officer of the Farm Loan Commissioner was afterward changed to that of Land Bank Commissioner, by Act of June 16, 1933, Session Laws, First Session 1933, 273." (*Federal Land Bank of Columbia* v. *Gaines*, 54 S. Ct. 168.)

> the debt hereby secured, all costs and legal expenses and reasonable attorney's fee to be fixed by the Court, and that said attorney's fee is and shall be a lien upon said premises and secured by this mortgage. * * *"

Subsequently, the respondent defaulted in the payment of his obligation, and the bank, as it had a right to do under the provisions of the Federal Farm Loan Act and under the covenants of the mortgage in question, declared the whole debt to be in default and demanded payment thereof from the respondent and his wife, and from the Salt River Valley National Farm Loan Association as indorser of the mortgage. Payment not being made, the bank instituted its suit in the Superior Court of Maricopa County to foreclose the mortgage and collect its debt.

The respondents filed their answer to this suit and set up a number of defenses to the relief prayed for by the bank. Among other things, the respondents denied the right of the bank to recover a reasonable fee to be paid its attorney for his services in connection with the conduct of the foreclosure proceedings. The respondent claimed also to be entitled to a credit of $360 on account of the par value of the stock which he owned in the Salt River Valley National Farm Loan Association.

The Superior Court of Maricopa County allowed the offset of $360 and denied the bank's right to recover an attorney's fee as prayed for in its complaint (R. 13).

Thereupon the Federal Land Bank of Berkeley perfected its appeal in the Supreme Court of Arizona from the judgment rendered by the Superior Court of Maricopa County. After hearing the appeal, the Supreme Court of Arizona, the Court of last resort in that State, in an opinion filed by its chief justice on July 1, 1933, reversed the opinion of the lower court with respect to the allowance of offset to the respondents in the amount of $360, but affirmed the de-

cision of the same Court in denying the bank the right to recover a reasonable attorney's fee (R. 21).

The opinion of the Supreme Court of Arizona is reported in 23 Pac. (2d) 563.

III. Specification of Error.

The assignment of error in this case is directed to the refusal of the Court below to permit the Federal Land Bank of Berkeley to recover a reasonable fee to be paid to its attorney for the institution and conduct of a suit in equity brought to foreclose the mortgage executed by the respondents.

IV. Question Presented.

The question presented is whether the provisions of the Federal Farm Loan Act expressly or impliedly make it unlawful for a Federal land bank to recover a reasonable fee to be paid to its attorney, in the event of foreclosure of one of its mortgages, if such fees are authorized and may be collected under the decisions and practice of the state where the mortgage contract is enforceable.

V. Summary of Argument.

The mere right to collect attorney's fees in foreclosure cases which are not being instituted by the banks at the present time, except in unusual circumstances, is not the only limitation on the powers of the bank that is involved. If the reasoning of that Court is carried to its logical conclusion, a Federal land bank would be prohibited from recovering its costs and expenses incurred in connection with the prosecution and defense of proceedings and suits of all kinds. However, when the various provisions of the Federal Farm Loan Act are considered in connection with the purposes which were sought to be accomplished by its en-

enactment, and in the light of the well established principles of law applicable to their interpretation, it will be found:

(1) That the Federal land banks are authorized just as natural persons to collect their necessary and reasonable costs and expenses, including proper attorney's fees, as an incident to the remedy of foreclosure.

(2) That the prohibitions contained in the Federal Farm Loan Act against the collection of any fee, commission, bonus, gift, or other consideration (12 U. S. C. §§791 and 983) were not intended to and do not in fact apply to the collection of Court costs and attorney's fees;

(3) That the inclusion of a stipulation in a note or mortgage taken by a Federal land bank for the payment of reasonable costs and attorney's fees, in the event of foreclosure, does not violate the prohibitions contained in section 12 of the Federal Farm Loan Act (12 U. S. C. § 771), which provides that: "No loan on mortgage shall be made under this Act at a rate of interest exceeding 6 per centum per annum, exclusive of amortization payments." (*Fowler* v. *Equitable Trust Co.*, 141 U. S. 411.)

(4) That the Federal Farm Loan Act has been construed by the governmental body charged with its execution as permitting the banks to recover costs and reasonable expenses and attorney's fees, in the event of foreclosure, and the banks themselves have put this construction into practical operation for a period of more than seventeen years;

(5) That if the law is so construed as to deny the Federal Land Bank of Berkeley the right to recover its reasonable costs and attorney's fees incurred in connection with the foreclosure proceedings involved in this case, it will have the effect of placing an undue burden upon, and causing a loss to, the other borrowers from the same institu-

tion who have met their respective obligations when and as they became due.

These propositions will be taken up and discussed in the order in which they have been stated.

VI.

Under the Provisions of the Federal Farm Loan Act, a Federal Land Bank is Authorized to Collect Its Reasonable Costs and Attorney's Fees, in the Event of Foreclosure.

A cardinal rule of statutory construction, which has been affirmed repeatedly by this Court,* is that effect must be given, if possible, to the whole statute and every part thereof, provided, of course, the construction is reasonable and not in conflict with the legislative intent.** Under a rule of statutory construction equally well established, the title of an act may be resorted to in doubtful cases as an aid in determining the legislative intent.** Under similar circumstances the Courts have held repeatedly that the reports of committees of the Congress may be taken into consideration to aid in the ascertainment of legislative intent.***

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* Petition of Public National Bank of New York, 49 Sup. Ct. 43, 278 U. S. 101; *Crooks* v. *Harrelson*, 35 F. (2d) 416, and affirmed 282 U. S. 55, 51 S. Ct. 49; *Hellmich* v. *Hellman*, 276 U. S. 233; *U. S.* v. *Baltimore Post Co.*, 268 U. S. 388, 45 S. Ct. 560.

** *Cornell* v. *Coyne*, 192 U. S. 418, 430; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348, 354.

*** *U. S.* v. *Union Pacific R. R. Co.*, 91 U. S. 72; *Butterfield* v. *Stranahan*, 192 U. S. 470; *U. S.* v. *Mo. Pac. R. Co.*, 278 U. S. 269; *Rector of Holy Trinity Church* v. *U. S.*, 143 U. S. 457.

It is respectfully submitted that with these well established principles of statutory construction in mind, a mere reading of the pertinent provisions of the Federal Farm Loan Act, and of the statements to be found in the reports of the committees of the Congess at the time of its enactment, will demonstrate conclusively the correctness of the conclusions stated in the caption.

Upon reference to the title of the Act itself it will be found that it was the purpose of the legislation, among other things, to create standard forms of investment based on farm mortgages, and "to *equalize rates of interest* upon farm loans." (Italics added.) (App. to Petitioner's Br., p. 45.)

Under the provisions of section 1 of the Act (12 U. S. C. Sec. 641), its administration was placed under the direction and control of the Federal Farm Loan Board, which body was, by the provisions of section 3 (12 U. S. C. Sec. 651), *charged with the execution of the Act.* The first reference to the farm mortgages mentioned in the title of the Act is found in section 2 thereof:

> "Wherever the term 'first mortgage' is used in this Act it shall be held to include such classes of first liens on farm lands as shall be approved by the Federal Farm Loan Board, and the credit instruments secured thereby." (12 U. S. C. Sec. 642.) (Petitioner's Br. p. 45.)

The general corporate powers of the Federal land banks, which were created for the purpose of making first mortgage loans and selling standard forms of security based on such mortgages, are set forth in section 4 of the Act (12 U. S. C. Sec. 676). Among other things, the banks are authorized "To sue and be sued, complain, interplead, and defend, in any court of law or equity, *as fully as natural persons.*" (Italics added.) In the same section each bank

is authorized "To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business herein described," the business of making farm mortgage loans.

Certain specific powers given every Federal land bank are set forth in section 13 of the Act (12 U. S. C. Sec. 781). Among these powers is the following:

> "To invest such funds as may be in its possession in the purchase of *qualified first mortgages* on farm lands situated within the Federal land bank district within which it is organized or for which it is acting." (Italics added.)

The qualified first mortgages mentioned in this section must of necessity have reference to "such classes of first liens on farm lands as shall be approved by the Federal Farm Loan Board."

In order to insure the safety of loans secured by these mortgages section 30 of the Act (12 U. S. C. Sec. 971) provides:

> "It shall be the duty of the Land Bank Commissioner to make examination of the laws of every State of the United States and to inform the Federal Farm Loan Board as rapidly as may be whether in his judgment the laws of each State relating to the conveying and recording of land titles, and the foreclosure of mortgages or other instruments securing loans, as well as providing homestead and other exemptions and granting the power to waive such exemptions as respects first mortgages, are such as to assure the holder thereof adequate safeguards against loss in the event of default on loans secured by any such mortgages."

The next paragraph of the same section provides that pending the making of such an examination in the case of any State that the Federal Farm Loan Board might declare

first mortgages on farm lands situated within such State ineligible as the basis for an issue of farm loan bonds.

With respect to these provisions of the Act the Committee on Banking and Currency of the Senate made the following statement in its report submitting the original bill to that body for consideration:

> "It is well understood that the laws in the several States vary as to land titles, registry, exemptions, homestead rights, *foreclosure*, and equities of redemption. It is therefore made the duty of the farm loan board to investigate these questions in each State and to declare mortgages ineligible as security for farm-loan bonds in those States where the laws do not give *adequate protection* to those loaning on first mortgage." (Italics added.)
>
> (Rpt. No. 144, 1st Sess. 64th Cong.) See Petitioner's Br. p. 42.)

This statement of the Committee recognizes the fact that the laws of the several States might vary as to land titles and *the foreclosure of mortgages*. It recognizes also that there would be no conflict between the provisions of the Farm Loan Act and the provisions of State laws designed to give "adequate protection to those loaning on first mortgage."

We have seen from the facts of the case at bar that the Federal Land Bank of Berkeley and the Federal Farm Loan Board have endeavored to carry out these plain and unambiguous provisions of the statute under which they were operating. They show first that the bank invested its funds in a qualified first mortgage; that the mortgage had been approved by the Federal Farm Loan Board; that it contained a provision for the payment of costs and attorney's fees in case of foreclosure, and, that after the borrower had defaulted in the payment of his loan and in order to protect itself against loss, the bank undertook to

enforce this covenant of its contract as a part of its remedy of foreclosure.

The same facts show with equal clarity that the bank has conducted its operations in accordance with the well settled law of the State of Arizona. In this connection the Supreme Court of Arizona said in its opinion "*We have frequently recognized and enforced contracts to pay attorneys' fees in foreclosure proceedings.* * * * The stipulation in the mortgage to pay an attorney's fee when it was put in there was legal, and is still legal, under the decisions and laws of this state." (R. 25.) (Italics added.)

Since the banks are authorized to sue and be sued as natural persons, and to make contracts providing for adequate safeguards and remedies in case of default on the part of their borrowers, the petitioner in this case was entitled and authorized to enforce this contract "to pay attorneys' fees" in the courts of Arizona, as an incident to the relief afforded and available to others engaged in the business of lending money on the security of farm mortgages, unless other provisions of the Act specifically deny the banks such right. In subsequent pages of this brief this *amicus* will endeavor to show that the banks are not denied this right.

VII.

The Prohibitions Contained in the Federal Farm Loan Act Against the Collection of "any Fee, Commission, Bonus, Gift, or Other Consideration" Were not Intended and do not in Fact Apply to the Collection of Court Costs and Attorney's Fees.

No one has contended that the sum of $125, which was prayed for by petitioner in its amended complaint, is not a reasonable fee for the services performed by its attorney. Nevertheless the Supreme Court of Arizona refused to allow the same on the theory that:

"Section 983 [of Title 12, U. S. Code] contains this restriction:

No land bank * * * shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized.'

"The identical thing forbidden, to wit, a fee, was contracted for in the mortgage and is now being demanded of the borrower. Such a fee is not 'specifically authorized' but is inferentially forbidden by the act." (R. 28.)

This *amicus* respectfully submits that it has just been demonstrated that when certain provisions of the Act are considered together, and in the light of the purposes for which they were enacted, the banks are authorized to recover costs and attorney's fees in connection with the institution and maintenance of foreclosure proceedings. It can be demonstrated with equal clarity that their collection is not "inferentially forbidden by the act."

Here again, before taking up the language of the sections in question, it will be well to consider several other well established rules for the construction of statutes, which have become almost axiomatic.* The courts have held repeatedly that when the language of a statute fairly permits a construction which will lead to an unreasonable result, such construction should be avoided. Furthermore, a rule which is followed universally by the courts in the exposition of statutes is that the intent of the law, if such intent can be clearly ascertained, shall prevail over the letter and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice.**

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* *Feitler* v. *U. S.*, 34 F. (2d) 30, Affirmed 281 U. S. 389; *Southern Surety Co.* v. *U. S.*, 23 F. (2d) 55 (Cert. den. 278 U. S. 604, 49 S. Ct. 11).

** *Fleischmann Constr. Co.* v. *U. S.*, 270 U. S. 349, 46 S. Ct. 284; *Barrett* v. *Van Pelt*, 268 U. S. 85, 45 S. Ct. 437.

When the provisions of 12 U. S. C., sections 781, 791 and 983 are read with these principles in mind, it will be seen that the fees and charges therein referred to were not intended to embrace attorney's fees. In fact, from a careful reading of the provisions in question it is apparent that the fees and charges therein referred to are those "included in the preliminary cost of negotiating mortgage loans", and that they have to do only with the transactions incident to negotiating and carrying the loans. In other words, the charges which are so carefully safeguarded by the provisions of section 781 are not in any way connected with the proper damages and costs which may be recovered by the bank, in order to indemnify it on account of expense and cost incident to enforcing its remedy after the borrower has failed to perform his contract. For example, the ninth paragraph of section 781, which sets forth some of the powers of the Federal land banks, defines the charges that may be made against "applicants for loans and borrowers" as "reasonable fees not exceeding the actual cost of appraisal and determination of title." Under the same section legal fees and recording charges imposed by the law in a State where the land to be mortgaged is located may also be included. The next sentence of the section confirms this interpretation. "The borrower may pay such fees and charges or he may arrange with the Federal land bank making the loan to advance the same, in which case said expenses shall be made a part of the face of the loan and paid off in amortization payments." It is obvious that the charges referred to are "preliminary costs" or they could not "be made a part of the face of the loan."

For the same reason it is equally clear that the prohibition contained in section 983 to the effect that no land bank "shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized" has refer-

ence only to fees or charges for services rendered by the bank to the borrower in connection with matters pertaining to the making and carrying of the loan. An attorney's fee does not come within this category. As we have seen previously, the right to collect attorney's fees in case of foreclosure is a mere incident to the remedy.

This construction is confirmed upon reference to the report from the Committee on Banking and Currency of the Senate previously alluded to.* It will be seen from this report that among the "primary considerations" were the following: "Absolute safety and attractive income to the investor; low interest rates, long-term mortgages, and amortization payments for the farmer; and adaptability to every part of the country." (Petitioner's Br., p. 30.) It will be noted that the first of these primary considerations was absolute safety and the second reasonable rates of interest to the farmer. With respect to the latter the Committee said:

> "In many parts of the country the farmer is charged extortionate and inexcusable rates of interest, regardless of usury laws and a decent regard for human necessities. He has a real grievance here. (Petitioner's Br.., p. 27.)

A further statement by the Committee throws considerable light upon the prohibition against collecting commissions, fees, bonuses and other charges from the borrower. "Present interest rates to farmers are so confused with commissions, fees, and charges of various sorts that it is difficult to ascertain the total cost of money on farm mortgages." Following this statement the Committee included a table under the caption "Farm mortgage loans—average rates for in-

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* Report No. 144, 1st Sess. 64th Cong., App. Petitioner's Br., p. 26.

terest and commission". Immediately after the insertion of this table the Committee makes the following observation:

> "As the foregoing table gives the average rate, there must be individual cases running much higher. Testimony before the joint subcommittees of the Senate and House Committees on Banking and Currency in 1914 gave the maximum rate as high as 25 per cent, including commissions and charges."

As this Court said in the case of *U. S.* v. *Mo. Pac. R. Co.*, 278 U. S. 269, these statements by the Committee "may be taken into consideration to aid in the ascertainment of the true legislative intent."

In this same connection the Court said in the case of the *Rector of Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 12 S. Ct. 511, p. 513:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

The statements of the Committee show that the evils which Congress sought to remedy were usurious interest rates and unconscionable commissions and bonuses, exacted in connection with the making and carrying of mortgage loans. We have seen also that the first of the primary considerations in the creation of the farm loan system was absolute safety. If we construe the words "fees and charges" in the Act to prohibit recovery of costs and attorney's fees in foreclosure proceedings, absolute safety to the investor in farm mortgages would be impaired. Furthermore, the Act would not be adaptable to every part of the country, if the banks could not avail themselves of the safeguards against loss provided for "natural persons" engaged in similar enterprises.

This brings us to a consideration of the question whether the stipulation in a mortgage taken by a Federal land bank for the payment of attorney's fees is a violation of the provisions of the Farm Loan Act with respect to the maximum amount of interest which may be charged the borrower.

VIII.

Inclusion of a Stipulation in a Note or Mortgage Taken by a Federal Land Bank for the Payment of Reasonable Costs and Attorney's Fees, in the Event of Foreclosure, Does not Violate the Provisions of the Act Prescribing the Maximum Interest Rates Which May be Charged to Borrowers.

The provisions of the Act with respect to the maximum rate of interest which may be charged borrowers by the Federal land banks are as follows:

> "Second. *Agreement for Repayment on Amortization Plan.*—Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan by means of a fixed number of annual or semiannual installments sufficient to cover, first, a charge on the loan at a rate not exceeding the interest rate in the last series of farm loan bonds issued by the land bank making the loan; second, a charge for administration and profits at a rate not exceeding, except with the approval of the Governor of the Farm Credit Administration, 1 per centum per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage; and, third, such amounts to be applied on the principal as will extinguish the debt within an agreed period, not less than five years nor more than forty years: * * *
>
> "Third. *Maximum Interest Rate.*—No loan on mortgage shall be made under this Act at a rate of interest

exceeding 6 per centum per annum, exclusive of amortization payments.

* * * * * * *

"Ninth. *Interest on Defaulted Payments; Payment of Taxes and Liens; Insurance.*—Every borrower shall pay simple interest on defaulted payments at the rate of 8 per centum per annum."

This Court has held that a fee allowed an attorney in a foreclosure action is not a charge to be considered like a bonus or commission in ascertaining whether the mortgagor is subject to usury. The same principle has been announced repeatedly by the Federal and State courts.** We see, therefore, that the collection of attorney's fees cannot be held to be illegal on the ground that it violates the provisions of the Act fixing the maximum interest rate which may be charged to borrowers. In fact, when all of the "restrictions" referred to by the Supreme Court of Arizona are reviewed in the light of the purpose which was sought to be accomplished by their insertion the reader is forced to the conclusion that the collection of costs and attorney's fees are not "inferentially forbidden by the Act."

**Fowler* v. *Equitable Trust Co.*, 141 U. S. 411. "The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious." *Spain* v. *Hamilton's Administrator*, 68 U. S. 604, 626.

** *Wilson Sewing Mach. Co.* v. *Moreno*, 7 F. 806; *American Mtg. Co.* v. *Downing*, 17 F. 660; *Best* v. *British and American Mtg. Co.*, 79 F. 401; *Union Mtg. Banking and Trust Co.* v. *Hagood*, 97 F. 360.

IX.

The Practical Construction Placed Upon the Act by Petitioner Has Been Approved by the Governmental Body Charged With Its Execution, and Has Been Followed by the Banks Themselves for a Period of More Than Seventeen Years.

As previously stated, the supervisory body charged with the execution of the Act has construed its provisions as permitting the Federal land banks to recover costs and reasonable attorney's fees in the event of foreclosure. The banks themselves have put this construction into practical operation for a period of more than seventeen years. Is this interpretation of the Act entitled to consideration? The Supreme Court of Florida answered this question in the case of *Bloxham, Comp. etc., v. The Consumers' Elec. Light and Street R. R. Co.*, 36 Fla. 519, 540, 51 Am. St. Reports 44, 29 L. R. A. 507, as follows:

> "Besides the judicial construction of statutes, there is known to the law another kind of construction. This kind of construction has especial application to statutes made for the regulation of the different departments of the Government, and is the interpretation put upon them by the actual administration of them by such departments. As distinguished from judicial construction, it is called *the practical construction of statutes.*" (Italics added.)

In the case of *State Board v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826, the court held that the legislature is presumed to be cognizant of the construction placed upon a law by the administrative body charged with its execution and after long continuance, without any legislation evincing dissent, courts will consider themselves warranted

in adopting that construction. In this connection see also case of *Illinois Surety Company* v. *U. S.*, 215 Fed. 334.

This well established principle of statutory construction has been very clearly stated by this court in the case of *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 53 S. Ct. 42, 44:

> "Moreover, the practical and long-continued construction of the executive departments charged with the administration of the act and with the duty of making the rules and regulations therein provided for has been in accordance with the view we have expressed as to the meaning of the section under consideration. The rules and regulations, as amended on May 11, 1914, deal with the entire subject in detail under the recital, '(i) The following tolerances *and variations* [italics supplied] from the quantity of the contents marked on the package shall be allowed: * * *' Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; due to differences in capacity of bottles and similar containers, resulting from unavoidable difficulties in manufacture, etc.; or in weight due to atmospheric differences in various places, etc. These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than eighteen years, with the silent acquiescence of Congress. If the meaning of the statutory words was doubtful, so as to call for a resort to extrinsic aid is an effort to reach a proper construction of them, we should hesitate to accept the committee reports in preference to this contemporaneous and long-continued practical construction of the act on the part of those charged with its administration. Such a construction, in cases of doubtful meaning, is accepted unless there are cogent and persuasive reasons for rejecting it. See, for example, *United States* v. *Johnston*, 124 U. S. 236, 253, 8 S. Ct. 446, 31 L. Ed. 389."

This brings us to a consideration of the injustice which would be done to other deserving borrowers of the Federal land banks who have paid their obligations promptly, if the narrow construction placed upon the law by the court below should be affirmed.

X.

If the Law Is so Construed as to Deny the Federal Land Bank of Berkeley the Right to Recover Its Reasonable Costs and Attorney's Fees Incurred in Connection With the Foreclosure Proceedings Involved in This Case, It Will Have the Effect of Placing an Undue Burden Upon, and Causing a Loss to, the Other Borrowers From the Same Institution Who Have Met Their Respective Obligations When and as They Become Due.

The reasons which prompt this assertion are apparent by referring again to the Report of the Committee on Banking and Currency of the Senate:

> "The land banks are permitted to charge borrowers 1 per cent more for interest than they pay bondholders. For example, if the current rate on farm-loan bonds is 4 per cent, the bank may charge not to exceed 5 per cent to farmers who borrow. This margin of 1 per cent on the amount of unpaid principal outstanding is available to the bank for its expenses and earnings, but it will probably be largely reduced in practice. The profits go to the local associations in the form of dividends on stock of the land bank held by the associations and reach the borrowers in the form of dividends on stock held by them in the associations. In this way the earnings of the system go to the borrowers, and its cooperative character is assured. If the 1 per cent margin is too high, no harm is done, for the excess comes back to the borrower in dividends. Section 13." (Petitioner's Br. p. 42.)

If, as stated by the court below, the banks are required to pay costs and attorney's fees in foreclosure cases out of their earnings, the borrowers who pay their obligations when due would be penalized and sustain a loss on account of the failure of defaulting borrowers to meet their obligations.

CONCLUSION.

In the light of the foregoing, this *amicus* submits that it has been demonstrated that the Federal land banks are authorized, under the provisions of the Federal Farm Loan Act, to collect costs and attorney's fees in the event of foreclosure; that the collection of these fees is not "inferentially forbidden by the Act"; that the supervisory body charged with its execution has so construed it; that if the law is construed otherwise it would cause injustice and hardship upon deserving borrowers; and that the decision of the court below should be reversed.

Respectfully submitted,

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As amicus Curiæ, Counsel for

The Federal Land Bank of Springfield, Springfield, Mass.
The Federal Land Bank of Baltimore, Baltimore, Md.
The Federal Land Bank of Columbia, Columbia, S. C.
The Federal Land Bank of Louisville, Louisville, Ky.
The Federal Land Bank of New Orleans, New Orleans, La.
The Federal Land Bank of St. Louis, St. Louis, Mo.
The Federal Land Bank of St. Paul, St. Paul, Minn.
The Federal Land Bank of Omaha, Omaha, Nebr.
The Federal Land Bank of Wichita, Wichita, Kans.
The Federal Land Bank of Houston, Houston, Texas.
The Federal Land Bank of Spokane, Spokane, Wash.

SUPREME COURT OF THE UNITED STATES.

No. 498.—October Term, 1933.

The Federal Land Bank of Berkeley, Petitioner, *vs.* Samuel S. Warner *et ux.* } On Writ of Certiorari to the Supreme Court of the State of Arizona.

[April 2, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

Respondents gave petitioner a mortgage on their farm lands in Arizona to secure a loan of $7,200 made in accordance with the Farm Loan Act.[1] The mortgage provides that in case of suit to foreclose the mortgagors shall pay a reasonable attorney's fee to be fixed by the court. And that clause is valid under Arizona law.[2] The borrowers having failed to pay according to their promise, petitioner brought this suit to foreclose the mortgage and prayed that an attorney's fee of $125 be included in the judgment. Respondents objected to the allowance of any amount on account of that item, the trial court sustained their contention and the supreme court upheld that part of the decree upon the ground that the collection of such a fee is forbidden by the following part of § 31: "No land bank . . . shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized". 12 U. S. C., § 983.

That construction cannot be sustained. The Act establishes cooperation between borrowers on farm mortgages and investors in the bonds secured by them. The requirement, by means of the mortgage provision, that a mortgagor shall bear the expense put upon the bank by his default is reasonable and in harmony with that principle. In the absence of a plain expression to that effect,

[1] Federal Farm Loan Act of July 17, 1916, 39 Stat. 360, as amended. 12 U. S. C., § 636, *et seq.*

[2] This case, — Ariz. —. McClintock *v.* Bolton (1899) 6 Ariz. 370, 377. See Estate of Amirault (1921) 22 Ariz. 122. Maxey *v.* Somerton State Bank (1921) 22 Ariz. 371. O. S. Stapley Co. *v.* Rogers (1923) 25 Ariz. 308. § 3840, R. C., 1928.

it may not be held that Congress intended to put upon non-defaulting borrowers any part of the expense of foreclosure of mortgages made by others. The Act does not prescribe proceedings for foreclosure but indicates that state laws are to govern. Section 30, directs the land bank commissioner to examine the laws of each State and to report, among other things, whether in his opinion they are such as to safeguard against loss in case of default. Code, § 971. It provides that, if examination shall show that the laws of any do not afford sufficient protection, the Farm Credit Administration may declare mortgages on land in that State ineligible. Code, § 972. And the petition for this writ indicates that, except in a few States where local law prohibits such contracts, all the mortgages taken by the Federal land banks contain stipulations for attorney's fees for foreclosure.[1] From this it appears that officers charged by law with the administration of the banks have always construed the Act to permit state laws to control. Our attention has not been called to any case in which that construction has been questioned. It is entitled to great weight. *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 280.

And we are of opinion that the decision of the Arizona supreme court in this case is not supported by the language it quotes from § 31 or by any other part of the Act.[2] The paragraph containing this language defines criminal offenses and prescribes punishments

[1] The petition indicates: Federal land banks hold mortgages amounting to approximately $1,120,000,000. Joint stock land banks hold mortgages amounting approximately to $500,000,000. Under the Emergency Farm Mortgage Act of May 12, 1933, Federal land banks are authorized immediately to expand their activities to the extent of $2,000,000,000 in additional farm mortgage financing operations. Mortgages taken under that Act will contain stipulations for attorney's fees for foreclosures.

[2] "Other than the usual salary or director's fee paid to any officer, director, or employee of a national farm loan association, a Federal land bank, or a joint stock land bank, and other than a reasonable fee paid by such association or bank to any officer, director, attorney, or employee for services rendered, no officer, director, attorney, or employee of an association or bank organized under this Act shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of such association or bank. No land bank or national farm loan association organized under this Act shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized. . . . Any person violating any provision of this paragraph shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or both." 12 U. S. C., § 983.

The first sentence holds officers, directors and employees to their usual salaries and directors' fees, and limits each of them, and as well every attorney for a bank, to "a reasonable fee . . . for services rendered". The second sentence contains the provision relied on. Its sole purpose is to limit banks to the charges, fees, etc., that are specifically authorized. Then, after restricting disclosure of names of borrowers, the paragraph makes violations of its provisions punishable by fine or imprisonment or both. Other than the counsel fee in question, the judgment below does not exclude any expense of foreclosure that is permitted by Arizona law. But plainly the compensation of attorneys engaged to foreclose a mortgage is as necessary as the payment of charges for advertisement, the service of process or the sale of the property. The items last mentioned are generally, if not indeed everywhere, chargeable to defaulting mortgagors. There is nothing in the Act to suggest purpose to denounce the one and permit the others. Moreover, the quoted clause is in harmony with the restrictions put upon loans by § 12, Code, § 771, and is undoubtedly intended to emphasize and strictly to enforce limitations set by § 13, Code, § 781 (9), upon fees for appraisal and examination of title, legal fees, recording charges and the like that are included in the preliminary costs of negotiating and carrying the mortgage loans. Undoubtedly Congress intended that state laws are to govern in respect of counsel fees for foreclosure of mortgages given under the Act.

But what is said above is not to be taken to approve the collection of a substantial attorney's fee for foreclosure in every case where stipulations such as the one before us are valid under state law. Uncontested foreclosures generally follow established routine and undoubtedly many of them may be made, without much if any cost to the banks, by their regularly employed salaried lawyers. In any such case the employment of another attorney or the exaction of any substantial charge for legal services cannot be justified as reasonable. In all cases—whether foreclosure is obtained by default or after contest—the mortgagor's promise to pay the mortgagee a reasonable attorney's fee is to be construed having regard to the purpose of Congress to enable farmers, by means of mortgages on their lands, to obtain loans at low cost.

Reversed.